Supreme Court of Ohio Clerk of Court - Filed June 19, 2015 - Case No. 2015-0386

In the Supreme Court of Ohio

Crutchfield, Inc.,	:	
	:	Case No. 2015-0386
	:	
Appellant,	:	
	:	Appeal from the Ohio
v.	:	Board of Tax Appeals
	:	
Joseph W. Testa,	:	
Tax Commissioner of Ohio,	:	
	:	BTA Case Nos. 2012-926,
Appellee.	:	2012-3068, 2013-2021

APPENDIX OF EXHIBITS IN SUPPORT OF APPELLANT CRUTCHFIELD, INC.'S RESPONSE IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPELLANT'S ASSIGNMENTS OF ERROR NUMBERS 1 AND 3 (sic)

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INDEX

Page

EXHIBIT

1. Motion to Designate Case as Complex Litigation in Case No. 2012-A-926 ..... Appx.1

2. Motion to Designate Case as Complex Litigation in Case No. 2012-A-3068 ..... Appx.5

3. Bases for Petition Appx.11

4. Final Determination (Jan. 26, 2012) Appx.21

5. Final Determination (Jul. 26, 2012) Appx.26

6. Final Determination (May 1, 2013) Appx.30

7. Notice of Appeal to Board of Tax Appeals (filed Mar. 23, 2012) Appx.34

8. Notice of Appeal to Board of Tax Appeals (filed Sept. 10, 2012) Appx.48

9. Notice of Appeal to Board of Tax Appeals (filed Jun. 26, 2013) Appx.61

10. Decision and Order of Board of Tax Appeals (Feb. 26, 2015) Appx.74

Respectfully submitted,

/s Edward J. Bernert

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon Christine T. Mesirow and Daniel W. Fausey, Office of the Ohio Attorney General, Taxation Section, attorneys for the Tax Commissioner, 30 E. Broad Street Columbus, 25th Floor, Ohio 43215 by electronic and ordinary mail delivery this 19th day of June, 2015.

/s Edward J. Bernert_____
Edward J. Bernert

Exhibit 1

FILED/RECEIVED
BOARD OF TAX APPEALS
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BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO

CRUTCHFIELD, INC.,	:	
Appellant,	:	Case No. 2012-A-926
v.	:	
JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO,	:	
Appellee.	:	

MOTION TO DESIGNATE CASE AS COMPLEX LITIGATION AND TO SET A CASE MANAGEMENT SCHEDULE

Pursuant to Ohio Adm. Code 5717-1-07, the Appellee, Tax Commissioner moves the Board to designate this matter as "Complex Litigation." The reasons in support are set forth in the following Memorandum in Support.

Respectfully submitted,

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Counsel for Appellee Joseph W. Testa,
Tax Commissioner of Ohio

MEMORANDUM IN SUPPORT

The appellee seeks the BTA to designate this appeal as complex litigation and to extend the date for involvement by the Board in discovery disputes pending the adoption of a case management schedule. Under the BTA's rules, designation of a case as "complex litigation" is appropriate, among other circumstances, when it "presents unusual or complex issues of fact" and/or when it "involves problems which merit increased board supervision or special case management procedures." See, Ohio Adm. Code 5717-1-07(A)(3) and (4), respectively. This is the situation here.

The appeal challenges the constitutionality of the Commercial Activity Tax ("CAT") nexus provisions as applied to the appellant. This issue has not yet been reviewed or decided by any Ohio tribunal or court, and is of great importance to the scope and vitality of Ohio's principal business tax. For most commercial enterprises doing business in Ohio, the CAT replaces both the Ohio business personal property tax and the Ohio corporate franchise tax. *Ohio Grocers Ass'n v. Levin*, 123 Ohio St.3d 303, ¶¶ 6-7 (2009). Thus, the appellant's challenge to Ohio's exercise of its taxing power under R.C. Chapter 5751 presents both a novel and fiscally important issue.

The Commissioner's determination that appellant has the requisite nexus to levy the CAT may be supported under any basis permitted by the United States Constitution. R.C. 5751.01(H)(4). Therefore, although the final determination finds sufficient nexus through appellant's meeting of the taxable gross receipts factor test, the Commissioner is free to develop the evidentiary record that supports other possible bases for his determination that nexus exists. *Key Services Corp. v. Zaino*, 95 Ohio St.3d 11, 2002-Ohio-1488.

Given the importance and nature of the issues present in this appeal, and the need to develop a full record for the appellate court's review of the constitutional challenge, it is likely that the course of proceedings may "involve[ ] problems which merit increased board supervision or special case management procedures." Counsel for appellee expects issues relating to confidentiality and trade secrets to arise during discovery, which may require the involvement of the Board. Thus, it is important that the rigid, unworkable short discovery period contained in the Board's rules be superseded by a case management schedule that will provide the structure necessary for the Board and parties to deal with such issues, as well as any pre-trial activities and motions to facilitate an orderly, expeditious evidentiary hearing.

For all these reasons, counsel for appellee respectfully requests the Board to grant our request that this appeal be designated "complex litigation," and order the parties to propose a case schedule consistent with that designation.

Respectfully submitted,

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Counsel of Appellee Joseph W. Testa,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the *Motion to Designate Case as Complex Litigation* was served upon the following by regular U.S. Mail on this 31st day of May, 2012:

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Exhibit 2

BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO

CRUTCHFIELD, INC.,	:	
Appellant,	:	Case No. 2012-A-3068
v.	:	
JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO,	:	
Appellee.	:	

MOTION TO DESIGNATE CASE AS COMPLEX LITIGATION AND TO SET A CASE MANAGEMENT SCHEDULE

Pursuant to Ohio Adm. Code 5717-1-07, the Appellee Tax Commissioner moves the Board to designate this matter as "complex litigation" and adopt the parties' proposed case management schedule, included herein. The reasons for this Motion are set forth in the following Memorandum in Support.

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Respectfully submitted,

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MEMORANDUM IN SUPPORT

The parties respectfully request that the Board designate this appeal as "complex litigation" and extend the date for Board involvement in discovery disputes pending the adoption of a case management schedule. The parties' proposed case management schedule is as follows:

PROPOSED CASE MANAGEMENT SCHEDULE

August 30, 2013	Deadline for identification of potential witnesses, both expert and non-expert
October 4, 2013	Exchange of Initial Expert Reports
November 1, 2013	Supplemental Witness Disclosure
November 29, 2013	Exchange of Rebuttal Expert Reports
February 28, 2014	Deadline for completion of discovery between the parties/last day for filing discovery-related motions with the board
April 4, 2014	Deadline for filing joint stipulations of fact, if any, with the board
28 days prior to hearing	Deadline for exchange of witness lists and trial exhibits between the parties
28 days prior to hearing	Deadline for filing pre-hearing motions
14 days prior to hearing	Deadline for filing pre-hearing briefs, if any, with the board
To be determined in the normal course of the board's business	Hearing dates before the Board of Tax Appeals
To be determined at the board's hearing	Deadline for Appellant's post-hearing brief
To be determined at the board's hearing	Deadline for Appellee's post-hearing brief
To be determined at the board's hearing	Deadline for Appellant's reply brief

* Witness Disclosure, including name, addresses, and business phone number (or home phone number, if no business number is available) shall be made for each witness. For lay witnesses, the disclosure shall include a brief description of the witness' relevant knowledge. For experts, the disclosure shall include a brief description of the expert's qualifications and summary of the expert's opinions and the basis or theory of that opinion.
** The filing of any motion by either party regarding discovery matters stays these proposed discovery dates for the period of time that the motions are pending, and moves the remaining dates accordingly. Motions to compel, if any, must be filed within 30 days after a response to a written discovery request.

Under the Board's rules, designation of a case as "complex litigation" is appropriate, among other circumstances, when it "presents unusual or complex issues of fact" and/or when it "involves problems which merit increased board supervision or special case management procedures." See Ohio Adm. Code 5717-1-07(A)(3) and (4), respectively. As in *Crutchfield v. Testa,* BTA Case No. 2012-A-926, this case presents legal issues and facts and circumstances that warrant designation as complex litigation. See attached, as Ex, A, *Crutchfield v. Testa*, BTA Case No. 2012-A-926 (Jun. 19, 2012) (order designating complex litigation and requiring additional information).

This appeal challenges the constitutionality of the Commercial Activity Tax ("CAT") nexus provisions. No dormant Commerce Clause nexus challenge to the CAT has yet been reviewed or decided by any Ohio tribunal or court. Moreover, the constitutionality of the CAT is of great importance to the scope and vitality of Ohio's principal business tax. For most commercial enterprises doing business in Ohio, the CAT replaces both the Ohio business personal property tax and the Ohio corporate franchise tax. *Ohio Grocers Ass'n v. Levin*, 123 Ohio St.3d 303, ¶¶ 6-7 (2009). Thus, the constitutional challenge to the CAT presents both a novel and fiscally important issue.

Given the nature and importance of the issues present in this appeal, it is likely that the course of proceedings may "involve[ ] problems which merit increased board supervision or special case management procedures." As a result, the rigid discovery period contained in the Board's rules should be replaced with a case management schedule that will provide the structure necessary for the Board and parties to deal with novel issues, as well as any pre-trial activities and motions, to facilitate an orderly, expeditious evidentiary hearing.

For the foregoing reasons, the parties' respectfully request that the Board grant their

request to designate this appeal as "complex litigation," and issue an order adopting the parties' proposed case management schedule provided above. The dates proposed in the parties' proposed case management schedule are roughly six months following the corresponding dates in the case management schedule adopted for *Crutchfield, Inc. v. Testa*, BTA Case No. 2012-A-926, to reflect that the two appeals were filed roughly six months apart. See, Ex. A.

Respectfully submitted,

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Counsel for Appellee

OHIO BOARD OF TAX APPEALS

Crutchfield, Inc., Appellant, vs. Joseph W. Testa, Tax Commissioner of Ohio, Appellee.	)))))))))))	CASE NO. 2012-A-926 (COMMERCIAL ACTIVITY TAX) ORDER (Designating Complex Litigation and Requiring Additional Information)

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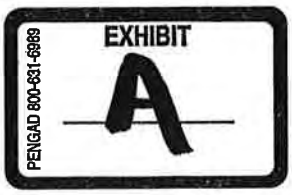
Entered JUN 19 2012

This matter is before the Board of Tax Appeals following the filing of a motion by the appellee Tax Commissioner seeking designation of this matter as "complex litigation." No response from the taxpayer was received.

Upon review, and pursuant to Ohio Adm. Code 5717-1-07, this matter is hereby designated "complex litigation." However, in order to facilitate the management of this matter and maintain consistent progress throughout the



proceedings, the parties are hereby ordered to file an agreed schedule regarding the following issues, no later than July 27, 2012:

- Deadline for certification of the statutory transcript, as required by R.C. 5717.01 and Ohio Adm. Code 5717-1-09(A)
- Date for conference between the parties to discuss streamlining/settlement of proceedings
- Deadline for identification and deposition of potential witnesses, both expert and non-expert
- Deadline for completion of discovery between the parties/last day for filing discovery-related motions with the board
- Deadline for filing joint stipulations of fact, if any, with the board
- Deadline for exchange of witness lists and trial exhibits between the parties

In the event the parties fail to comply with this directive, a schedule may be established by this board to which further adjustments will be restricted.

On behalf of the Board of Tax Appeals, pursuant to
Ohio Adm. Code 5717-1-10

Carrie C. Young

Carrie C. Young
Attorney Examiner

Exhibit 3

ATTACHMENT A

BASES FOR PETITION

I. Introduction

Petitioner ("Crutchfield" or the "Company") is a direct marketer with no connection to the State of Ohio. It sells its goods through the Internet from locations entirely outside of the state. While some of Crutchfield's customers reside in Ohio, Crutchfield itself has no personnel, agents, or property of any kind in Ohio, makes no sales within the State of Ohio, and fulfills all orders from locations outside of Ohio by means of interstate common carriers.

As a result, Crutchfield has been, and remains, protected from the imposition of Ohio's state and local taxes under the Commerce Clause of the United States Constitution. *See, e.g., National Bellas Hess v. Ill. Rev. Dep't*, 386 U.S. 753 (1967)(establishing a "bright-line" physical presence requirement before taxes can be imposed on remote sellers); Quill *Corp. v. North Dakota*, 504 U.S. 298 (1992)(upholding the "bright-line" rule). *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981)(applying the bright-line rule to a general revenue tax on the value of coal extracted from the state, and finding that "the interstate business must have a substantial nexus with the State before any tax may be levied on it").

The United States Supreme Court has long, and consistently, held that a company does not fall under the tax powers of a foreign state absent "local incident" on the part of the company that brings it within the tax authority of that state. *See, e.g., Norton Co. v. Ill. Rev. Dep't*, 340 U.S. 534, 537 (1951)(explaining that states can "more easily" meet

the "local incident" requirement in sales and use tax cases, "because the impact of those taxes is on the local buyer or user"); *National Geographic Society v. Cal. Bd. of Equalization*, 430 U.S. 551, 558 (1977)(noting that the requirement of a "local incident" is higher in gross receipts tax cases since, unlike sales and use taxes, they involve a direct tax, rather than simply "the administrative [burden] of collecting it"); *see also Standard Pressed Steel Co. v. Wash. Dep't of Rev.*, 419 U.S. 560, 562-63 (1975)(a gross receipts tax case citing, with approval, the "local incident" requirement of *Norton*); *accord Tyler Pipe Industries, Inc. v. Wash. Dept. of Rev.*, 483 U.S. 232, 251 (1987)(requiring an in-state physical presence before a business and occupations tax could be imposed).

In addition to its constitutional protections, Crutchfield also submits that it does not satisfy the statutory requirements for imposition of Ohio's Commercial Activity Tax (the "CAT") inasmuch as it does not satisfy the in-state activity requirements that underpin the imposition of such tax. Read as a whole, the CAT seeks to tax in-state business activities, not those between Ohio residents and those companies, like Crutchfield, having no in-state presence whatsoever. Moreover, even if it were to be held that the CAT statutes were ambiguous as to their application to out-of-state companies like Crutchfield, "there is one fundamental precept which still obtains in the interpretation of taxation statutes, to wit, that in case of doubt, such doubt is to be resolved in favor of the taxpayer." *Stephens v. Glander*, 151 Ohio St. 62, 84 N.E.2d 279, 281 (1949).

Crutchfield submits that, when all doubts are resolved in its favor as required by law, the assessment against it should be rescinded in its entirety.

Further, Crutchfield submits that any penalty sought to be imposed on the Company should be rescinding based upon the fact it (1) was reasonable for Crutchfield to conclude that Ohio's attempt to export a domestic tax to a foreign corporation with no in-state presence violated state and federal law; and (2) Crutchfield's reliance on well established legal principles, including the United States Supreme Court bright-line "substantial nexus" rule was justified and appropriate in Ohio's unprecedented attempt to impose the CAT on non-resident mail order and Internet sellers.

II. Specific Grounds

1. Because Crutchfield engages in no commercial activity within the State of Ohio and, likewise, neither owns nor leases property in the state, either directly or indirectly, the Company is not "doing business in the state" under R.C. § 5751.02. The Commercial Activity Tax (the "CAT"), therefore, does not apply.

2. Crutchfield lacked a "substantial nexus with this state" under R.C. § 5751.01(H) inasmuch as it (a) neither owned nor used "part or all of its capital in this state"; (b) lacks a "certificate of compliance with the laws of this state authorizing [it] to do business in this state"; and (c) does not "otherwise [have] nexus in this state … under the constitution [sic] of the United States."

3. Crutchfield lacked a "'bright-line presence' in this state" under R.C. § 5751.01(H) & (I) inasmuch as it did not have (a) "at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars"; (b) "during the calendar year payroll in this state of at least fifty thousand dollars"; (c) during the calendar year "taxable gross receipts of at least five hundred thousand dollars," inasmuch as (i) none of its gross receipts are subject to taxation in Ohio; and (ii) it had no

taxable sales within the State of Ohio; or (d) "during the calendar year within this state at least twenty-five per cent [sic] of the person's total property, total payroll, or total receipts, and was not "domiciled in this state as an individual or for corporate, commercial, or other business purposes."

4. Crutchfield's receipts are not subject to taxation because, under R.C. § 5751(F), such tax is "prohibited by the constitution [sic] or laws of the United States ..."

5. Crutchfield's receipts are not subject to taxation because it lacks a "substantial nexus with this state" under R.C. § 5751.02(A).

6. Ohio statutes should be interpreted to avoid the imposition of the CAT on Crutchfield, inasmuch as imposing the tax on Crutchfield would violate the Company's rights under the Commerce Clause of the United States Constitution, as discussed below. It is the duty of those charged with interpreting and applying a law to construe it so as to "prevent a declaration of unconstitutionality." *Conold v. Stern*, 138 Ohio St. 352, 25 N.E.2d 133, 143 (1941)(citation omitted). Only by excluding Crutchfield from the reach of the CAT can the constitutionality of the tax be preserved.

7. Application of the CAT to Crutchfield would violate the Company's rights under the Commerce Clause of the United States Constitution since Crutchfield does not possess the requisite "bright-line" physical presence in Ohio. *See, e.g., National Bellas Hess v. Ill. Rev. Dep't*, 386 U.S. 753 (1967)(establishing a "bright-line" physical presence requirement before taxes can be imposed on remote sellers); Quill *Corp. v. North Dakota*, 504 U.S. 298 (1992)(upholding the bright-line rule). *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981)(applying the bright-line rule to a general revenue tax on the value of coal extracted from the state, and finding that "the interstate business must

have a substantial nexus with the State before any tax may be levied on it"). Since the bright-line physical presence test applies to taxes like the CAT, the assessment is void in its entirety.

8. Even if it were held, contrary to clear United States Supreme Court precedent, that the "bright-line" rule applied in numerous cases such as *National Bellas Hess*, *Quill*, and *Commonwealth Edison* applied only to sales and use taxes, the CAT is the functional equivalent of a sales tax. It is calculated based upon, and applies to, retail sales transactions by Crutchfield to residents of the State of Ohio. Whether cast as an assessment of use tax, sales tax, or gross receipts tax, "there is no real distinction [between such taxes] that have been subjected to Commerce Clause scrutiny." *Commonwealth Edison*, 453 U.S. at 616.

10. The penalty should be abated.

ATTACHMENT A

BASES FOR PETITION

I. Introduction

Petitioner ("Crutchfield" or the "Company") is an online retailer with no connection to the State of Ohio. It sells its goods through the Internet from locations entirely outside of the state. While some of Crutchfield's customers reside in Ohio, Crutchfield itself has no personnel, agents, or property of any kind in Ohio, and makes no sales from within the State of Ohio.

As a result, Crutchfield is protected from imposition of the Commercial Activity Tax ("CAT") under the Commerce Clause of the United States Constitution. The Supreme Court has made clear that a state lacks the power under the Commerce Clause to impose a gross receipts tax on a company with no physical presence in the state. *Tyler Pipe Industries, Inc. v. Wash. Dep't of Revenue*, 483 U.S. 232, 250 (1987). This "bright line," physical presence standard derives from constitutional principles and authorities set forth by the Court in *National Bellas Hess v. Ill. Dep't of Revenue*, 386 U.S. 753 (1967), and subsequently reaffirmed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). As it applies to gross receipts taxes like the CAT, the Court has made clear that the physical presence standard is only satisfied through in-state activities by, or on behalf of, the taxpayer that are significantly associated with its ability to establish and maintain a market in the state. *Tyler Pipe,* 483 U.S. at 250; *Standard Pressed Steel, Inc. v. Wash. Dep't of Revenue*, 419 U.S. 560, 562-64 (1975) (sufficient nexus for gross receipts tax established through presence of full-time employee in the state calling on customers);

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617, 626 (1981) (citing *Bellas Hess* for threshold of state taxing power for gross receipts tax purposes, and finding sufficient presence); *see also Norton Co. v. Ill. Dep't of Revenue,* 340 U.S. 534, 537 (state lacks authority to impose gross receipts tax on a company with no "local incident" in the state). The Supreme Court relied upon *Tyler Pipe, Standard Pressed Steel*, and *Commonwealth Edison* in upholding the physical presence test for sales and use taxes in *Quill*, and the Court has never held that a state has the power under the Commerce Clause to impose gross receipts tax on a company based on any lesser, or different standard than the "bright line," physical presence test of *Tyler Pipe* and *Quill*. Because Crutchfield lacks the necessary physical presence in Ohio required under the Commerce Clause, it is not subject to the CAT, and the assessments against it should be withdrawn.

In addition to its constitutional protections, Crutchfield also submits that it does not satisfy the statutory requirements for imposition of Ohio's CAT inasmuch as it does not satisfy the in-state activity requirements that underpin the imposition of such tax. Read as a whole, the CAT seeks to tax in-state business activities, not those between Ohio residents and those companies, like Crutchfield, having no in-state presence whatsoever. Moreover, even if it were to be held that the CAT statutes were ambiguous as to their application to out-of-state companies like Crutchfield, "there is one fundamental precept which still obtains in the interpretation of taxation statutes, to wit, that in case of doubt, such doubt is to be resolved in favor of the taxpayer." *Stephens v. Glander*, 151 Ohio St. 62, 84 N.E.2d 279, 281 (1949).

Crutchfield submits that, when all doubts are resolved in its favor as required by law, the assessment against it should be rescinded in its entirety.

Further, Crutchfield submits that any penalty sought to be imposed on the Company should be rescinding based upon the fact it (1) was reasonable for Crutchfield to conclude that Ohio's attempt to export a domestic tax to a foreign corporation with no in-state presence violated state and federal law; and (2) Crutchfield's reliance on well established legal principles, including the United States Supreme Court bright-line "substantial nexus" rule was justified and appropriate in light of Ohio's unprecedented attempt to impose the CAT on non-resident mail order and Internet sellers.

II. Specific Grounds

1. Because Crutchfield engages in no commercial activity within the State of Ohio and, likewise, neither owns nor leases property in the state, either directly or indirectly, the Company is not "doing business in this state" under R.C. § 5751.02. The Commercial Activity Tax, therefore, does not apply.

2. Crutchfield lacked a "substantial nexus with this state" under R.C. § 5751.01(H) inasmuch as it (a) neither owned nor used "part or all of its capital in this state"; (b) lacks a "certificate of compliance with the laws of this state authorizing [it] to do business in this state"; and (c) does not "otherwise [have] nexus in this state ... under the constitution [sic] of the United States."

3. Crutchfield lacked a "'bright-line presence' in this state" under R.C. § 5751.01(H) & (I) inasmuch as it did not have (a) "at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars"; (b) "during the calendar year payroll in this state of at least fifty thousand dollars"; (c) during the calendar year "taxable gross receipts of at least five hundred thousand dollars," inasmuch as (i) none of its gross receipts are subject to taxation in Ohio; and

(ii) it had no taxable sales within the State of Ohio; or (d) "during the calendar year within this state at least twenty-five per cent [sic] of the person's total property, total payroll, or total receipts." In addition, Crutchfield was not "domiciled in this state as an individual or for corporate, commercial, or other business purposes."

4. Crutchfield's receipts are not subject to taxation because, under R.C. § 5751.01(F)(2)(ff), such tax is "prohibited by the Constitution or laws of the United States ..."

5. Ohio statutes should be interpreted to avoid the imposition of the CAT on Crutchfield, inasmuch as imposing the tax on Crutchfield would violate the Company's rights under the Commerce Clause of the United States Constitution, as discussed below. It is the duty of those charged with interpreting and applying a law to construe it so as to "prevent a declaration of unconstitutionality." *Conold v. Stern*, 138 Ohio St. 352, 25 N.E.2d 133, 143 (1941) (citation omitted). Only by excluding Crutchfield from the reach of the CAT can the constitutionality of the tax be preserved.

6. Application of the CAT to Crutchfield would violate the Company's rights under the Commerce Clause of the United States Constitution since Crutchfield does not possess the requisite "bright-line" physical presence in Ohio. The Supreme Court has made clear that a state lacks the power under the Commerce Clause to impose a gross receipts tax on a company with no physical presence in the state. *Tyler Pipe*, 483 U.S. at 250 (1987) ("the crucial factor governing nexus is whether <u>the activities performed in this state on behalf of the taxpayer</u> are significantly associated with the taxpayer's ability to establish and maintain a market in this State") (internal citation omitted and emphasis added); *Standard Pressed Steel*, 419 U.S. at 562-64 (1975) (sufficient nexus for gross

receipts tax established through presence of full-time employee in the state calling on customers); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (applying the bright-line rule to a general revenue tax on the value of coal extracted from the state, and finding that "the interstate business must have a substantial nexus with the State before any tax may be levied on it"). This physical presence standard derives from constitutional principles and authorities set forth by the Court in *National Bellas Hess* and subsequently reaffirmed in *Quill*. The Supreme Court relied upon *Tyler Pipe, Standard Pressed Steel*, and *Commonwealth Edison* in upholding the physical presence test for sales and use taxes in *Quill*, and the Court has never held that a state has the power under the Commerce Clause to impose gross receipts tax on a company based on any lesser, or different standard than physical presence test of *Tyler Pipe* and *Quill*. Since the bright-line physical presence test applies to taxes like the CAT, the assessment is void in its entirety.

7. Even if it were held, contrary to clear United States Supreme Court precedent, that the "bright-line" rule applied in *Tyler Pipe* and affirmed in *Quill* applied only to sales and use taxes, the CAT is the functional equivalent of a sales tax. It is calculated based upon, and applies to, retail sales transactions by Crutchfield to residents of the State of Ohio. Whether cast as an assessment of use tax, sales tax, or gross receipts tax, "there is no real distinction [between such taxes] that has been subjected to Commerce Clause scrutiny." *Commonwealth Edison*, 453 U.S. at 616.

8. The amount of the assessment of tax exceeds the true tax due if it were to be determined that Crutchfield is liable for the CAT.

9. The penalty should be abated.

Exhibit 4

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FINAL DETERMINATION

Date: JAN 26 2012

Crutchfield Corporation
1 Crutchfield Park
Charlottesville, VA 22911

Re: Nineteen Assessments
Commercial Activity Tax
Taxpayer ID No. 96059827
Tax Period: 2005-2010

This is the final determination of the Tax Commissioner on a petition for reassessment filed pursuant to R.C. 5751.09 concerning the following commercial activity tax assessments:

Assessment No.	Period	Tax	Interest	Penalty	Payments	Total
17201017321478	07/01/05-12/31/05	$1,958.00	$550.65	$2,076.90	$0.00	$4,585.55
17201017321479	01/01/06-03/31/06	$1,106.00	$294.86	$608.30	$0.00	$2,009.16
17201017321480	04/01/06-06/30/06	$1,663.00	$418.48	$914.65	$0.00	$2,996.13
17201017321481	07/01/06-09/30/06	$1,663.00	$393.33	$914.65	$0.00	$2,970.98
17201017321482	10/01/06-12/31/06	$1,813.00	$396.82	$997.15	$0.00	$3,206.97
17201017321483	01/01/07-03/31/07	$1,707.00	$339.95	$938.85	$0.00	$2,985.80
17201017321484	04/01/07-06/30/07	$2,561.00	$458.95	$1,408.55	$0.00	$4,428.50
17201017321485	07/01/07-09/30/07	$2,561.00	$407.30	$1,408.55	$0.00	$4,376.85
17201017321486	10/01/07-12/31/07	$2,711.00	$376.49	$1,491.05	$0.00	$4,578.54
17201017321487	01/01/08-03/31/08	$2,628.00	$312.55	$1,445.40	$0.00	$4,385.95
17201017321488	04/01/08-06/30/08	$3,505.00	$346.95	$1,927.75	$0.00	$5,779.70
17201017321489	07/01/08-09/30/08	$3,505.00	$276.27	$1,927.75	$0.00	$5,709.02
17201017321490	10/01/08-12/31/08	$3,655.00	$228.21	$2,010.25	$0.00	$5,893.46
17201017321491	01/01/09-03/31/09	$3,085.00	$154.59	$1,696.75	$0.00	$4,936.34
17201017321492	04/01/09-06/30/09	$3,856.00	$145.15	$2,120.80	$0.00	$6,121.95
17201017321493	07/01/09-09/30/09	$3,856.00	$96.03	$2,120.80	$0.00	$6,072.83
17201017321494	10/01/09-12/31/09	$3,856.00	$52.40	$2,120.08	$0.00	$6,029.20
17201100738715	01/01/10-03/31/10	$10,000.00	$254.25	$5,500.00	$0.00	$15,754.25
17201100738714	04/01/10-06/30/10	$10,000.00	$156.71	$5,500.00	$0.00	$15,656.71
	Total	$65,689.00	$5,659.94	$37,128.23	$0.00	$106,239.43

The petitioner is a corporation based in Virginia. The petitioner is a direct marketer that sells consumer electronics through the Internet from locations entirely outside of Ohio. The petitioner ships its merchandise via the U.S. Mail or using common carriers. The petitioner is not incorporated in Ohio and does not have physical facilities, offices, or showrooms in Ohio. The petitioner has no employees in Ohio and does not own or lease property in Ohio. A review of the petitioner's website indicates that the petitioner sends free catalogs to U.S. resident customers.

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JAN 26 2012

Information in the possession of the Tax Commissioner shows that the petitioner had more than $500,000 in sales to customers in Ohio and that it failed to file and pay the commercial activity tax required by R.C. 5751.02(A).

The petitioner initially requested a personal appearance hearing. The petitioner subsequently requested a telephone hearing that was conducted on August 9, 2011. During the hearing, the petitioner's representative stated that the facts in the case were identical to the facts presented by another Internet retailer in its petition for reassessment, for which an appeal was pending at the Ohio Board of Tax Appeals.

The petitioner contends that it is not subject to the commercial activity tax, and requests cancellation of the assessments. This contention is not well taken. In summary, the petitioner is subject to the tax because it has "substantial nexus with this state," as that phrase is defined in R.C. 5751.01(H). The petitioner satisfies the third and/or fourth conditions in that division, and therefore is a person on whom the tax is levied. The petitioner sells consumer goods through orders received via the Internet and telephone orders. While the petitioner admits that it has customers in Ohio to which it sells and ships these goods, it asserts that it has no activities or contacts in Ohio which rise to the level necessary for Ohio to constitutionally impose the tax.

Effective June 30, 2005, R.C. 5751.02(A) levies the commercial activity tax

> * * * on each person with taxable gross receipts for the privilege of doing business in this state. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during the calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state.

Pursuant to R.C. 5751.01(H), a person has "substantial nexus with this state" if the person meets any of the following conditions:

(1) Owns or uses a part or all of its capital in this state;
(2) Holds a certificate of compliance with the laws of this state authorizing the person to do business in this state;
(3) Has bright-line presence in this state;
(4) Otherwise has nexus with this state to an extent that the person can be required to remit the tax imposed under this chapter under the Constitution of the United States.

Pursuant to R.C. 5751.01(I), a person "has bright-line presence" in this state for a reporting period if the person meets any of the following conditions:

(1) Has at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars. * * *
(2) Has during the calendar year payroll in this state of at least fifty thousand dollars. * * *
(3) Has during the calendar year taxable gross receipts of at least five hundred thousand dollars.

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JAN 26 2012

(4) Has at any time during the calendar year within this state at least twenty-five percent of the person's total property, total payroll, or total gross receipts.
(5) Is domiciled in this state as an individual or for corporate, commercial, or other business purposes.

Division (F) of R.C. 5751.01 defines gross receipts as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person * * * [including] [a]mounts realized from the sale, exchange, or other disposition of the taxpayer's property to or with another." Specifically excluded from gross receipts are "any receipts for which the tax imposed by this chapter is prohibited by the Constitution or laws of the United States or the Constitution of Ohio." R.C. 5751.01(F)(2)(aa) (formerly R.C. 5751.01(F)(2)(z)).

"Taxable gross receipts" is defined as gross receipts sitused to this state under R.C. 5751.033. For purposes of the petitioner, division (E) applies:

> Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by common carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has completed shall be considered the place where the purchaser receives the property. * * *

The petitioner's overriding assertion is that the Commerce Clause of the United States Constitution precludes the State of Ohio from subjecting it to the commercial activity tax under the authority of R.C. 5751.01(H)(3) or (4). The petitioner contends that imposition of the tax pursuant to either (H)(3) or (H)(4) is improper because the petitioner allegedly does not have the nexus with Ohio that is required under the Commerce Clause. The petitioner asserts that the nexus required is a "physical presence" in the taxing state, which it alleges it did not have during the assessed periods.

To the extent that the petitioner is challenging the constitutionality of R.C. 5751.01(H)(3), (4) and/or R.C.5751.01(I)(3), the Commissioner is without jurisdiction to adjudicate the constitutionality of those statutes. However, the laws of Ohio are presumed to be constitutional. See *State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567. Moreover, a discussion of the constitutional issues is particularly warranted for two reasons. First, R.C. 5751.01(H)(4) requires the commercial activity tax to be imposed to the fullest extent permissible under the Constitution. Second, regardless of R.C. 5751.01(H)(4), compliance with constitutional limitations on state taxation is the sine qua non of any tax assessment.

The Tax Commissioner's assessments have been computed based on information in the Tax Commissioner's possession. By the petitioner's own admission and by information available at the petitioner's website, the goods sold were delivered by common carrier to their ultimate destination in Ohio. Thus, they were "received in this state" and were "taxable gross receipts" within the meaning of R.C. 5751.033(E) and R.C. 5751.01(I)(3). For each calendar year at issue, based on information in the possession of the Tax Commissioner, taxable gross receipts exceeded $500,000.00, so the petitioner had "bright-line presence" pursuant to R.C. 5751.01

(H)(3) and R.C. 5751.01(I)(3). Therefore, the petitioner had "substantial nexus with this state" and was subject to the tax because it had taxable gross receipts exceeding $500,000.00 in each calendar year.

The petitioner contends that application of the commercial activity tax to it would violate the Commerce Clause since the petitioner allegedly does not possess the "bright-line" physical presence in Ohio required by *National Bellas Hess v. Ill. Rev. Dep't* (1967), 386 U.S. 753 and *Quill Corp. v. North Dakota* (1992), 504 U.S. 298. In *Quill*, the Court held that North Dakota's attempt to require an out-of-state mail order company with no physical presence in the state to collect and remit use tax violated the "substantial nexus" requirement of the Commerce Clause. However, in the years since *Quill*, the Court has not extended its holding to other taxes, including income taxes or gross receipts taxes. The highest court in most, but not all, states that have considered the issue, including Ohio, has found that *Quill* applies only to sales and use taxes. See *Couchot v. State Lottery Commission* (1996), 74 Ohio St.3d 417 (finding that the physical-presence requirement of *Quill* was not applicable to taxation of Ohio Lottery winnings of a nonresident, because *Quill* applied only to sales and use taxes, although the requirement would have been satisfied anyway by virtue of the winner's purchase and redemption of the winning ticket in Ohio in a prior year). See also, for example, *Geoffrey v. South Carolina* (1993), 437 S.E.2d 13, *A & F Trademark, Inc. v. Tolson* (2004), 167 N.C. App. 150, *LANCO, Inc. v. Dir., Div. of Taxation* (2006), 908 A.2d 176, *Tax Comm'r v. MBNA America Bank* (2006), 220 W.Va. 163, and *Capital One Bank v. Commissioner* (2009), 453 Mass. 1.

The petitioner contends that even if the holding of *Quill* is limited to the sales and use tax context, that holding should apply to the commercial activity tax. However, the Supreme Court of Ohio recently found that the commercial activity tax is not, as the petitioner asserts, the functional equivalent of a sales tax. See *Ohio Grocers Ass'n v. Levin* (2009), 123 Ohio St.3d 303 (holding that the tax is not an excise tax "upon the sale or purchase of food"). Therefore, the *Quill* requirement of physical presence does not apply to the commercial activity tax.

In order to be constitutionally valid, the assessments herein must still satisfy the "substantial nexus" requirement of the Commerce Clause. The petitioner's continuous, systematic, and significant solicitation and this exploitation of the economic marketplace in Ohio is sufficient for this purpose. Therefore, under established Commerce Clause jurisprudence, the imposition of the tax measured by those receipts is not prohibited by the laws or Constitution of either the United States or Ohio.

Lastly, the petitioner contends that even if it was subject to the tax and required to file returns and pay the amounts due, the assessed penalties should be abated in full due to its reasonable reliance on its interpretation of constitutional principles limiting state taxation. The petitioner was assessed penalty pursuant to R.C. 5751.06(A), (B)(1), and (D). The Tax Commissioner may abate these penalties pursuant to R.C. 5751.06(F). The petitioner's contention is not well taken.

Accordingly, the assessments are affirmed.

Current records indicate that no additional payments have been made on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made

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payable to "Ohio Treasurer Josh Mandel." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Commercial Activity Tax Division, P.O. Box 16678, Columbus, OH 43216-6678.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL

JOSEPH W. TESTA
TAX COMMISSIONER

/s/ Joseph W. Testa

Joseph W. Testa
Tax Commissioner

Exhibit 5

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Ohio Department of TAXATION
Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 2 6 2012

Crutchfield Corporation
1 Crutchfield Park
Charlottesville, VA 22911

Re: Five Assessments
Commercial Activity Tax
Taxpayer ID No. 96059827
Tax Periods: 2010 - 2011

This is the final determination of the Tax Commissioner on five petitions for reassessment filed pursuant to R.C. 5751.09 concerning the following commercial activity tax assessments:

Assessment No.	Period	Tax	Interest	Penalty	Payments	Total
17201131820313	07/01/10-09/30/10	$10,000.00	$393.42	$2,000.00	$0.00	$12,393.42
17201131820314	10/01/10-12/31/10	$10,000.00	$291.51	$2,000.00	$0.00	$12,291.51
17201131820315	01/01/11-03/31/11	$10,000.00	$195.07	$2,000.00	$0.00	$12,195.07
17201131820316	04/01/11-06/30/11	$10,000.00	$94.25	$2,000.00	$0.00	$12,094.25
17201133443980	07/01/11-09/30/11	$10,000.00	$14.25	$2,000.00	$0.00	$12,014.25
	Total	$50,000.00	$988.50	$10,000.00	$0.00	$60,988.50

The petitioner is a corporation based in Virginia. The petitioner is a direct marketer that sells consumer electronics through the Internet from locations entirely outside of Ohio. The petitioner ships its merchandise via the U.S. Mail or using common carriers. The petitioner is not incorporated in Ohio and does not have physical facilities, offices, or showrooms in Ohio. The petitioner has no employees in Ohio and does not own or lease property in Ohio. A review of the petitioner's website indicates that the petitioner sends free catalogs to U.S. resident customers. Information in the possession of the Tax Commissioner shows that the petitioner had more than $500,000 in sales to customers in Ohio and that it failed to file and pay the commercial activity tax required by R.C. 5751.02(A).

The petitioner waived its right to a hearing, therefore the matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied along with the petition.

The petitioner contends that it is not subject to the commercial activity tax, and requests cancellation of the assessments. This contention is not well taken. In summary, the petitioner is subject to the tax because it has "substantial nexus with this state," as that phrase is defined in R.C. 5751.01(H). The petitioner satisfies the third and/or fourth conditions in that division, and therefore is a person on whom the tax is levied. The petitioner sells consumer goods through orders received via the Internet and telephone orders. While the petitioner admits that it has customers in Ohio to which it sells and ships these goods, it asserts that it has no activities or contacts in Ohio which rise to the level necessary for Ohio to constitutionally impose the tax.

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Effective June 30, 2005, R.C. 5751.02(A) levies the commercial activity tax

> * * * on each person with taxable gross receipts for the privilege of doing business in this state. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during the calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state.

Pursuant to R.C. 5751.01(H), a person has "substantial nexus with this state" if the person meets any of the following conditions:

(1) Owns or uses a part or all of its capital in this state;
(2) Holds a certificate of compliance with the laws of this state authorizing the person to do business in this state;
(3) Has bright-line presence in this state;
(4) Otherwise has nexus with this state to an extent that the person can be required to remit the tax imposed under this chapter under the Constitution of the United States.

Pursuant to R.C. 5751.01(I), a person "has bright-line presence" in this state for a reporting period if the person meets any of the following conditions:

(1) Has at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars. * * *
(2) Has during the calendar year payroll in this state of at least fifty thousand dollars. * * *
(3) Has during the calendar year taxable gross receipts of at least five hundred thousand dollars.

(4) Has at any time during the calendar year within this state at least twenty-five percent of the person's total property, total payroll, or total gross receipts.
(5) Is domiciled in this state as an individual or for corporate, commercial, or other business purposes.

Division (F) of R.C. 5751.01 defines gross receipts as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person * * * [including] [a]mounts realized from the sale, exchange, or other disposition of the taxpayer's property to or with another." Specifically excluded from gross receipts are "any receipts for which the tax imposed by this chapter is prohibited by the Constitution or laws of the United States or the Constitution of Ohio." R.C. 5751.01(F)(2)(aa) (formerly R.C. 5751.01(F)(2)(z)).

"Taxable gross receipts" is defined as gross receipts sitused to this state under R.C. 5751.033. For purposes of the petitioner, division (E) applies:

> Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by common carrier or by other means of transportation,

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> the place at which such property is ultimately received after all transportation has completed shall be considered the place where the purchaser receives the property. * * *

The petitioner's overriding assertion is that the Commerce Clause of the United States Constitution precludes the State of Ohio from subjecting it to the commercial activity tax under the authority of R.C. 5751.01(H)(3) or (4). The petitioner contends that imposition of the tax pursuant to either (H)(3) or (H)(4) is improper because the petitioner allegedly does not have the nexus with Ohio that is required under the Commerce Clause. The petitioner asserts that the nexus required is a "physical presence" in the taxing state, which it alleges it did not have during the assessed periods.

To the extent that the petitioner is challenging the constitutionality of R.C. 5751.01(H)(3), (4) and/or R.C.5751.01(I)(3), the Commissioner is without jurisdiction to adjudicate the constitutionality of those statutes. However, the laws of Ohio are presumed to be constitutional. See *State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567. Moreover, a discussion of the constitutional issues is particularly warranted for two reasons. First, R.C. 5751.01(H)(4) requires the commercial activity tax to be imposed to the fullest extent permissible under the Constitution. Second, regardless of R.C. 5751.01(H)(4), compliance with constitutional limitations on state taxation is the sine qua non of any tax assessment.

The Tax Commissioner's assessments have been computed based on information in the Tax Commissioner's possession. By the petitioner's own admission and by information available at the petitioner's website, the goods sold were delivered by common carrier to their ultimate destination in Ohio. Thus, they were "received in this state" and were "taxable gross receipts" within the meaning of R.C. 5751.033(E) and R.C. 5751.01(I)(3). For each calendar year at issue, based on information in the possession of the Tax Commissioner, taxable gross receipts exceeded $500,000.00, so the petitioner had "bright-line presence" pursuant to R.C. 5751.01 (H)(3) and R.C. 5751.01(I)(3). Therefore, the petitioner had "substantial nexus with this state" and was subject to the tax because it had taxable gross receipts exceeding $500,000.00 in each calendar year.

The petitioner contends that application of the commercial activity tax to it would violate the Commerce Clause since the petitioner allegedly does not possess the "bright-line" physical presence in Ohio required by *National Bellas Hess v. Ill. Rev. Dep't* (1967), 386 U.S. 753 and *Quill Corp. v. North Dakota* (1992), 504 U.S. 298. In *Quill*, the Court held that North Dakota's attempt to require an out-of-state mail order company with no physical presence in the state to collect and remit use tax violated the "substantial nexus" requirement of the Commerce Clause. However, in the years since *Quill*, the Court has not extended its holding to other taxes, including income taxes or gross receipts taxes. The highest court in most, but not all, states that have considered the issue, including Ohio, has found that *Quill* applies only to sales and use taxes. See *Couchot v. State Lottery Commission* (1996), 74 Ohio St.3d 417 (finding that the physical-presence requirement of *Quill* was not applicable to taxation of Ohio Lottery winnings of a nonresident, because *Quill* applied only to sales and use taxes, although the requirement would have been satisfied anyway by virtue of the winner's purchase and redemption of the winning ticket in Ohio in a prior year). See also, for example, *Geoffrey v. South Carolina* (1993), 437 S.E.2d 13, *A & F Trademark, Inc. v. Tolson* (2004), 167 N.C. App. 150, *LANCO, Inc. v. Dir., Div. of Taxation* (2006), 908 A.2d 176, *Tax Comm'r v. MBNA America Bank* (2006), 220 W.Va. 163, and *Capital One Bank v. Commissioner* (2009), 453 Mass. 1.

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The petitioner contends that even if the holding of *Quill* is limited to the sales and use tax context, that holding should apply to the commercial activity tax. However, the Supreme Court of Ohio recently found that the commercial activity tax is not, as the petitioner asserts, the functional equivalent of a sales tax. See *Ohio Grocers Ass'n v. Levin* (2009), 123 Ohio St.3d 303 (holding that the tax is not an excise tax "upon the sale or purchase of food"). Therefore, the *Quill* requirement of physical presence does not apply to the commercial activity tax.

In order to be constitutionally valid, the assessments herein must still satisfy the "substantial nexus" requirement of the Commerce Clause. The petitioner's continuous, systematic, and significant solicitation and this exploitation of the economic marketplace in Ohio is sufficient for this purpose. Therefore, under established Commerce Clause jurisprudence, the imposition of the tax measured by those receipts is not prohibited by the laws or Constitution of either the United States or Ohio.

Lastly, the petitioner contends that even if it was subject to the tax and required to file returns and pay the amounts due, the assessed penalties should be abated in full due to its reasonable reliance on its interpretation of constitutional principles limiting state taxation. The petitioner was assessed penalties pursuant to R.C. 5751.06(A), (B)(1), and (D). The Tax Commissioner may abate these penalties pursuant to R.C. 5751.06(F). The petitioner's contention is not well taken.

Accordingly, the assessments are affirmed.

Current records indicate that no payments have been made on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Ohio Treasurer Josh Mandel." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Commercial Activity Tax Division, P.O. Box 16678, Columbus, OH 43216-6678.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL

JOSEPH W. TESTA
TAX COMMISSIONER

/s/ Joseph W. Testa

Joseph W. Testa
Tax Commissioner

Exhibit 6

0000000163

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: MAY - 1 2013

Crutchfield Corporation
1 Crutchfield Park
Charlottesville, VA 22911

Re: Three Assessments
Commercial Activity Tax
Taxpayer ID No. 96059827
Tax Periods: 10/01/2011 – 06/30/2012

This is the final determination of the Tax Commissioner on a petition for reassessment filed pursuant to R.C. 5751.09 concerning the following commercial activity tax assessments:

Assessment No.	Period	Tax	Interest	Penalty	Payments	Total
17201219256375	10/01/11-12/31/11	$10,000.00	$117.53	$2,000.00	$0.00	$12,117.53
17201219256376	01/01/12-03/31/12	$10,000.00	$44.38	$2,000.00	$0.00	$12,044.38
17201228344172	04/01/12-06/30/12	$10,000.00	$41.10	$5,500.00	$0.00	$15,541.10
	Total	$30,000.00	$203.01	$9,500.00	$0.00	$39,703.01

The petitioner is a corporation based in Virginia. The petitioner is a direct marketer that sells consumer electronics through the Internet from locations entirely outside of Ohio. The petitioner ships its merchandise via the U.S. Mail or using common carriers. The petitioner is not incorporated in Ohio and does not have physical facilities, offices, or showrooms in Ohio. The petitioner has no employees in Ohio and does not own or lease property in Ohio. A review of the petitioner's website indicates that the petitioner sends free catalogs to U.S. resident customers. Information in the possession of the Tax Commissioner shows that the petitioner had more than $500,000 in sales to customers in Ohio and that it failed to file and pay the commercial activity tax required by R.C. 5751.02(A).

The petitioner waived its right to a hearing, therefore the matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied along with the petition.

The petitioner contends that it is not subject to the commercial activity tax, and requests cancellation of the assessments. This contention is not well taken. In summary, the petitioner is subject to the tax because it has "substantial nexus with this state," as that phrase is defined in R.C. 5751.01(H). The petitioner satisfies the third and/or fourth conditions in that division, and therefore is a person on whom the tax is levied. The petitioner sells consumer goods through orders received via the Internet and telephone orders. While the petitioner admits that it has customers in Ohio to which it sells and ships these goods, it asserts that it has no activities or contacts in Ohio which rise to the level necessary for Ohio to constitutionally impose the tax.

000000164

MAY - 1 2013

Effective June 30, 2005, R.C. 5751.02(A) levies the commercial activity tax

> * * * on each person with taxable gross receipts for the privilege of doing business in this state. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during the calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state.

Pursuant to R.C. 5751.01(H), a person has "substantial nexus with this state" if the person meets any of the following conditions:

(1) Owns or uses a part or all of its capital in this state;
(2) Holds a certificate of compliance with the laws of this state authorizing the person to do business in this state;
(3) Has bright-line presence in this state;
(4) Otherwise has nexus with this state to an extent that the person can be required to remit the tax imposed under this chapter under the Constitution of the United States.

Pursuant to R.C. 5751.01(I), a person "has bright-line presence" in this state for a reporting period if the person meets any of the following conditions:

(1) Has at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars. * * *
(2) Has during the calendar year payroll in this state of at least fifty thousand dollars. * * *
(3) Has during the calendar year taxable gross receipts of at least five hundred thousand dollars.
(4) Has at any time during the calendar year within this state at least twenty-five percent of the person's total property, total payroll, or total gross receipts.
(5) Is domiciled in this state as an individual or for corporate, commercial, or other business purposes.

Division (F) of R.C. 5751.01 defines gross receipts as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person * * * [including] [a]mounts realized from the sale, exchange, or other disposition of the taxpayer's property to or with another." Specifically excluded from gross receipts are "any receipts for which the tax imposed by this chapter is prohibited by the Constitution or laws of the United States or the Constitution of Ohio." R.C. 5751.01(F)(2)(jj) (formerly R.C. 5751.01(F)(2)(z)).

"Taxable gross receipts" is defined as gross receipts sitused to this state under R.C. 5751.033. For purposes of the petitioner, division (E) applies:

> Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by common carrier or by other means of

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MAY - 1 2013

transportation, the place at which such property is ultimately received after all transportation has completed shall be considered the place where the purchaser receives the property. * * *

The petitioner's overriding assertion is that the Commerce Clause of the United States Constitution precludes the State of Ohio from subjecting it to the commercial activity tax under the authority of R.C. 5751.01(H)(3) or (4). The petitioner contends that imposition of the tax pursuant to either (H)(3) or (H)(4) is improper because the petitioner allegedly does not have the nexus with Ohio that is required under the Commerce Clause. The petitioner asserts that the nexus required is a "physical presence" in the taxing state, which it alleges it did not have during the assessed periods.

To the extent that the petitioner is challenging the constitutionality of R.C. 5751.01(H)(3), (4) and/or R.C.5751.01(I)(3), the Commissioner is without jurisdiction to adjudicate the constitutionality of those statutes. However, the laws of Ohio are presumed to be constitutional. See *State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567. Moreover, a discussion of the constitutional issues is particularly warranted for two reasons. First, R.C. 5751.01(H)(4) requires the commercial activity tax to be imposed to the fullest extent permissible under the Constitution. Second, regardless of R.C. 5751.01(H)(4), compliance with constitutional limitations on state taxation is the sine qua non of any tax assessment.

The Tax Commissioner's assessments have been computed based on information in the Tax Commissioner's possession. By the petitioner's own admission and by information available at the petitioner's website, the goods sold were delivered by common carrier to their ultimate destination in Ohio. Thus, they were "received in this state" and were "taxable gross receipts" within the meaning of R.C. 5751.033(E) and R.C. 5751.01(I)(3). For each calendar year at issue, based on information in the possession of the Tax Commissioner, taxable gross receipts exceeded $500,000.00, so the petitioner had "bright-line presence" pursuant to R.C. 5751.01 (H)(3) and R.C. 5751.01(I)(3). Therefore, the petitioner had "substantial nexus with this state" and was subject to the tax because it had taxable gross receipts exceeding $500,000.00 in each calendar year.

The petitioner contends that application of the commercial activity tax to it would violate the Commerce Clause since the petitioner allegedly does not possess the "bright-line" physical presence in Ohio required by *National Bellas Hess v. Ill. Rev. Dep't* (1967), 386 U.S. 753 and *Quill Corp. v. North Dakota* (1992), 504 U.S. 298. In *Quill*, the Court held that North Dakota's attempt to require an out-of-state mail order company with no physical presence in the state to collect and remit use tax violated the "substantial nexus" requirement of the Commerce Clause. However, in the years since *Quill*, the Court has not extended its holding to other taxes, including income taxes or gross receipts taxes. The highest court in most, but not all, states that have considered the issue, including Ohio, has found that *Quill* applies only to sales and use taxes. See *Couchot v. State Lottery Commission* (1996), 74 Ohio St.3d 417 (finding that the physical-presence requirement of *Quill* was not applicable to taxation of Ohio Lottery winnings of a nonresident, because *Quill* applied only to sales and use taxes, although the requirement would have been satisfied anyway by virtue of the winner's purchase and redemption of the winning ticket in Ohio in a prior year). See also, for example, *Geoffrey v. South Carolina* (1993), 437 S.E.2d 13, *A & F Trademark, Inc. v. Tolson* (2004), 167 N.C. App. 150, *LANCO, Inc. v. Dir., Div. of Taxation* (2006), 908 A.2d 176, *Tax Comm'r v. MBNA America Bank* (2006), 220

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W.Va. 163, and *Capital One Bank v. Commissioner* (2009), 453 Mass. 1.

MAY - 1 2013

The petitioner contends that even if the holding of *Quill* is limited to the sales and use tax context, that holding should apply to the commercial activity tax. However, the Supreme Court of Ohio recently found that the commercial activity tax is not, as the petitioner asserts, the functional equivalent of a sales tax. See *Ohio Grocers Ass'n v. Levin* (2009), 123 Ohio St.3d 303 (holding that the tax is not an excise tax "upon the sale or purchase of food"). Therefore, the *Quill* requirement of physical presence does not apply to the commercial activity tax.

In order to be constitutionally valid, the assessments herein must still satisfy the "substantial nexus" requirement of the Commerce Clause. The petitioner's continuous, systematic, and significant solicitation and this exploitation of the economic marketplace in Ohio is sufficient for this purpose. Therefore, under established Commerce Clause jurisprudence, the imposition of the tax measured by those receipts is not prohibited by the laws or Constitution of either the United States or Ohio.

Lastly, the petitioner contends that even if it was subject to the tax and required to file returns and pay the amounts due, the assessed penalties should be abated in full due to its reasonable reliance on its interpretation of constitutional principles limiting state taxation. The petitioner was assessed penalty pursuant to R.C. 5751.06(A), (B)(1), and (D). The Tax Commissioner may abate these penalties pursuant to R.C. 5751.06(F). The petitioner's contention is not well taken.

Accordingly, the assessments are affirmed.

Current records indicate that no payments have been made on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Ohio Treasurer Josh Mandel." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Commercial Activity Tax Division, P.O. Box 16678, Columbus, OH 43216-6678.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL

JOSEPH W. TESTA
TAX COMMISSIONER

/s/ Joseph W. Testa

Joseph W. Testa
Tax Commissioner

Exhibit 7

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DEPT. OF TAXATION OF OHIO
OFFICE OF TAX COMMISSIONER

BEFORE THE OHIO BOARD OF TAX APPEALS

CRUTCHFIELD, INC., 1 Crutchfield Park Charlottesville, VA 22911 Appellant, vs. **JOSEPH W. TESTA,** Tax Commissioner of Ohio 30 East Broad Street, 22nd Floor Columbus, OH 43215, Appellee.	)	BTA Case No._____ (COMMERCIAL ACTIVITY TAX) Amount in Controversy: Total Tax, Penalties, and Pre-Assessment Interest of $106,239.43, Plus Post-Assessment Interest.

NOTICE OF APPEAL

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LEGAL COUNSEL FOR APPELLANT,
CRUTCHFIELD, INC.

Pursuant to Section 5717.02 of the Ohio Revised Code ("R.C."), Crutchfield, Inc. ("Crutchfield" or the "Company") hereby gives notice of appeal to the Ohio Board of Tax Appeals ("the Board") from a final determination dated January 26, 2012 ("Determination") issued by Joseph W. Testa, Tax Commissioner of the State of Ohio ("Commissioner") that affirmed assessments of Ohio Commercial Activity Tax ("CAT") against Crutchfield with respect to the following tax periods: (1) July 1, 2005 through December 31, 2005; (2) January 1, 2006 through March 31, 2006; (3) April 1, 2006 through June 30, 2006; (4) July 1, 2006 through September 30, 2006; (5) October 1, 2006 through December 31, 2006; (6) January 1, 2007 through March 31, 2007; (7) April 1, 2007 through June 30, 2007; (8) July 1, 2007 through September 30, 2007; (9) October 1, 2007 through December 31, 2007; (10) January 1, 2008 through March 31, 2008; (11) April 1, 2008 through June 30, 2008; (12) July 1, 2008 through September 30, 2008; (13) October 1, 2008 through December 31, 2008; (14) January 1, 2009 through March 31, 2009; (15) April 1, 2009 through June 30, 2009; (16) July 1, 2009 through September 30, 2009; (17) October 1, 2009 through December 31, 2009; (18) January 1, 2010 through March 31, 2010; and (19) April 1, 2010 through June 30, 2010 (together, the "Tax Periods"). A copy of the Determination is attached hereto as required by statute. *See* Exhibit A.

BACKGROUND

1. Crutchfield is an online retailer with no connection to the State of Ohio. It sells its goods through the Internet from locations entirely outside of the state.

2. While some of Crutchfield's customers reside in Ohio, Crutchfield itself has no personnel, agents, representatives, or property of any kind in Ohio, and makes no sales from within the State of Ohio.

3. As a result, Crutchfield is protected from imposition of the Commercial Activity Tax ("CAT") under the Commerce Clause of the United States Constitution. The United States

Supreme Court has made clear that a state lacks the power under the Commerce Clause to impose a gross receipts tax on a company with no physical presence in the state. *Tyler Pipe Industries, Inc. v. Wash. Dep't of Revenue*, 483 U.S. 232, 250 (1987). This "bright line," physical presence standard derives from constitutional principles and authorities set forth by the Court in *National Bellas Hess v. Ill. Dep't of Revenue*, 386 U.S. 753 (1967), and subsequently reaffirmed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

4. As it applies to gross receipts taxes like the CAT, the Court has made clear that the physical presence standard is only satisfied through in-state activities by, or on behalf of, the taxpayer that are significantly associated with its ability to establish and maintain a market in the state. *Tyler Pipe,* 483 U.S. at 250; *Standard Pressed Steel, Inc. v. Wash. Dep't of Revenue*, 419 U.S. 560, 562-64 (1975) (sufficient nexus for gross receipts tax established through presence of full-time employee in the state calling on customers); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617, 626 (1981) (citing *Bellas Hess* for threshold of state taxing power for gross receipts tax purposes, and finding sufficient presence); *see also Norton Co. v. Ill. Dep't of Revenue,* 340 U.S. 534, 537 (state lacks authority to impose gross receipts tax on a company with no "local incident" in the state). The Supreme Court relied upon *Tyler Pipe, Standard Pressed Steel*, and *Commonwealth Edison* in upholding the physical presence test for sales and use taxes in *Quill*, and the Court has never held that a state has the power under the Commerce Clause to impose gross receipts tax on a company based on any lesser, or different standard than the "bright line," physical presence test of *Tyler Pipe* and *Quill*. Because Crutchfield lacks the necessary physical presence in Ohio required under the Commerce Clause, it is not subject to the CAT, and the assessments against it should be cancelled.

5. In addition to its constitutional protections, Crutchfield also submits that it does not satisfy the statutory requirements for imposition of Ohio's Commercial Activity Tax (the

"CAT") inasmuch as it does not satisfy the in-state activity requirements that underpin the imposition of such tax.

6. Read as a whole, the CAT seeks to tax in-state business activities, not those between Ohio residents and those companies, like Crutchfield, having no in-state presence whatsoever. Moreover, even if it were to be held that the CAT statutes were ambiguous as to their application to out-of-state companies like Crutchfield, "there is one fundamental precept which still obtains in the interpretation of taxation statutes, to wit, that in case of doubt, such doubt is to be resolved in favor of the taxpayer." *Stephens v. Glander*, 151 Ohio St. 62, 84 N.E.2d 279, 281 (1949).

7. Crutchfield submits that, when all doubts are resolved in its favor as required by law, the Determination against it should be vacated in its entirety and the assessments cancelled.

8. Further, Crutchfield submits that any penalty sought to be imposed on the Company should be rescinded because: (1) it was reasonable for Crutchfield to conclude that Ohio's attempt to export a domestic tax to a foreign corporation with no in-state presence violated state and federal law; and (2) Crutchfield's reliance on well established legal principles, including the United States Supreme Court bright-line "substantial nexus" rule was justified and appropriate in light of Ohio's unprecedented attempt to impose the CAT on non-resident mail order and Internet sellers.

THE FINAL DETERMINATION

9. In support of his finding that Crutchfield was subject to the CAT, despite its lack of physical presence in Ohio, for each of the Tax Periods, the Commissioner rested the Determination on the following grounds:

10. First, the Determination concluded that Crutchfield had "substantial nexus" with Ohio as that term is defined in the statute [*see* R.C. 5751.01(H)], based on the "bright-line presence" test set forth in R.C. 5751.03(I)(3). [Determination at 2.] The Commissioner concluded that "the petitioner had "substantial nexus with this state" and was subject to the tax because it had taxable gross receipts exceeding $500,000.00 in each calendar year." *Id.* at 4.

11. There was no other "bright-line" statutory basis for the Determination's conclusion that Crutchfield owed CAT for the Tax Period.

12. The Commissioner concluded that "[u]nder established Commerce Clause jurisprudence, the imposition of the tax measured by those receipts is not prohibited by the laws or the Constitution of either the United States or Ohio." [*Id.*]

13. Each of the grounds given by the Commissioner for the Determination is in error.

ASSIGNMENTS OF ERROR

1. Because Crutchfield engages in no commercial activity within the State of Ohio and, likewise, neither owns nor leases property in the state, either directly or indirectly, the Company is not "doing business in this state" under R.C. § 5751.02. The Commercial Activity Tax, therefore, does not apply.

2. Crutchfield lacked a "substantial nexus with this state" under R.C. § 5751.01(H) inasmuch as it: (a) neither owned nor used "part or all of its capital in this state" [R.C. 5751.01(H)(1)]; (b) lacks a "certificate of compliance with the laws of this state authorizing [it] to do business in this state" [R.C. 5751.01(H)(2)]; and (c) does not "otherwise [have] nexus in this state … under the constitution [sic] of the United States." [R.C. 5751.01(H)(4)].

3. Crutchfield lacked a "'bright-line presence' in this state" under R.C. § 5751.01(H)(3) & (I) inasmuch as it did not have: (a) "at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars" [R.C.

5751.01(I)(1)]; (b) "during the calendar year payroll in this state of at least fifty thousand dollars" [R.C. 5751.01(I)(2)]; (c) during the calendar year "taxable gross receipts of at least five hundred thousand dollars," inasmuch as (i) none of its gross receipts are subject to taxation in Ohio; and (ii) it had no taxable sales within the State of Ohio [R.C. 5751.01(I)(3)]; or (d) "during the calendar year within this state at least twenty-five per cent [sic] of the person's total property, total payroll, or total receipts." [R.C. 5751.01(I)(4)]. In addition, Crutchfield was not "domiciled in this state as an individual or for corporate, commercial, or other business purposes." [R.C. 5751.01(I)(5)].

4. Crutchfield's receipts are not subject to taxation because, under R.C. § 5751.01(F)(2)(ff), such tax is "prohibited by the Constitution or laws of the United States ..."

5. Ohio statutes should be interpreted to avoid the imposition of the CAT on Crutchfield, inasmuch as imposing the tax on Crutchfield would violate the Company's rights under the Commerce Clause of the United States Constitution, as discussed below. It is the duty of those charged with interpreting and applying a law to construe it so as to "prevent a declaration of unconstitutionality." *Conold v. Stern*, 138 Ohio St. 352, 25 N.E.2d 133, 143 (1941) (citation omitted). Only by excluding Crutchfield from the reach of the CAT can the constitutionality of the tax be preserved.

6. Application of the CAT to Crutchfield would violate the Company's rights under the Commerce Clause of the United States Constitution since Crutchfield does not possess the requisite "bright-line" physical presence in Ohio. The Supreme Court has made clear that a state lacks the power under the Commerce Clause to impose a gross receipts tax on a company with no physical presence in the state. *Tyler Pipe*, 483 U.S. at 250 (1987) ("the crucial factor governing nexus is whether <u>the activities performed in this state on behalf of the taxpayer</u> are significantly associated with the taxpayer's ability to establish and maintain a market in this

State") (internal citation omitted and emphasis added); *Standard Pressed Steel*, 419 U.S. at 562-64 (1975) (sufficient nexus for gross receipts tax established through presence of full-time employee in the state calling on customers); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (applying the bright-line rule to a general revenue tax on the value of coal extracted from the state, and finding that "the interstate business must have a substantial nexus with the State before any tax may be levied on it"). This physical presence standard derives from constitutional principles and authorities set forth by the Court in *National Bellas Hess* and subsequently reaffirmed in *Quill*. The Supreme Court relied upon *Tyler Pipe, Standard Pressed Steel*, and *Commonwealth Edison* in upholding the physical presence test for sales and use taxes in *Quill*, and the Court has never held that a state has the power under the Commerce Clause to impose gross receipts tax on a company based on any lesser, or different standard than physical presence test of *Tyler Pipe* and *Quill*. Since the bright-line physical presence test applies to taxes like the CAT, the assessments are void in their entirety, and the Determination should be vacated.

7. Even if an "economic presence test" were to be applied to this case, the imposition of the CAT against Crutchfield would be unlawful inasmuch as Crutchfield lacked an economic presence in Ohio, and, instead, merely communicated with customers in Ohio via interstate commerce from locations entirely outside of the state.

8. The Commissioner's assessment of the "failing to register penalty" is erroneous and unlawful in that Crutchfield was not required to register for the CAT because Crutchfield was not a "person subject to" chapter 5751 of the Revised Code. R.C. 5751.04(B).

9. The penalty should be abated. The Commissioner erred in arbitrarily and capriciously asserting penalties for each of the aforesaid reasons, and in light of Crutchfield's good faith reliance upon existing federal constitutional law in regard to the application of the "substantial

nexus" test to cases involving gross receipts taxes, as well as sales and use taxes and other state taxes.

REQUEST FOR HEARING

Appellant Crutchfield requests that the Board of Tax Appeals or its attorney examiners conduct a *de novo* hearing in Columbus, Ohio in connection with these assignments of error.

REQUEST FOR RELIEF

Crutchfield respectfully asks that the Determination be vacated in its entirety, that the assessments against Crutchfield for the Tax Periods cancelled, that the Commissioner be barred from asserting CAT liability against Crutchfield for the Tax Periods, and that Crutchfield be awarded such other relief as is just and equitable.

Respectfully submitted,

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LEGAL COUNSEL FOR APPELLANT, CRUTCHFIELD, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this Notice of Appeal has been filed, via hand delivery, with Joseph W. Testa, Tax Commissioner of Ohio, 30 East Broad Street, 22nd Floor, Columbus, Ohio, on this 23rd day of March, 2012.

Steven L. Smiseck

Steven L. Smiseck

EXHIBIT A

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FINAL DETERMINATION

Date: JAN 26 2012

Crutchfield Corporation
1 Crutchfield Park
Charlottesville, VA 22911

Re: Nineteen Assessments
Commercial Activity Tax
Taxpayer ID No. 96059827
Tax Period: 2005-2010

This is the final determination of the Tax Commissioner on a petition for reassessment filed pursuant to R.C. 5751.09 concerning the following commercial activity tax assessments:

Assessment No.	Period	Tax	Interest	Penalty	Payments	Total
17201017321478	07/01/05-12/31/05	$1,958.00	$550.65	$2,076.90	$0.00	$4,585.55
17201017321479	01/01/06-03/31/06	$1,106.00	$294.86	$608.30	$0.00	$2,009.16
17201017321480	04/01/06-06/30/06	$1,663.00	$418.48	$914.65	$0.00	$2,996.13
17201017321481	07/01/06-09/30/06	$1,663.00	$393.33	$914.65	$0.00	$2,970.98
17201017321482	10/01/06-12/31/06	$1,813.00	$396.82	$997.15	$0.00	$3,206.97
17201017321483	01/01/07-03/31/07	$1,707.00	$339.95	$938.85	$0.00	$2,985.80
17201017321484	04/01/07-06/30/07	$2,561.00	$458.95	$1,408.55	$0.00	$4,428.50
17201017321485	07/01/07-09/30/07	$2,561.00	$407.30	$1,408.55	$0.00	$4,376.85
17201017321486	10/01/07-12/31/07	$2,711.00	$376.49	$1,491.05	$0.00	$4,578.54
17201017321487	01/01/08-03/31/08	$2,628.00	$312.55	$1,445.40	$0.00	$4,385.95
17201017321488	04/01/08-06/30/08	$3,505.00	$346.95	$1,927.75	$0.00	$5,779.70
17201017321489	07/01/08-09/30/08	$3,505.00	$276.27	$1,927.75	$0.00	$5,709.02
17201017321490	10/01/08-12/31/08	$3,655.00	$228.21	$2,010.25	$0.00	$5,893.46
17201017321491	01/01/09-03/31/09	$3,085.00	$154.59	$1,696.75	$0.00	$4,936.34
17201017321492	04/01/09-06/30/09	$3,856.00	$145.15	$2,120.80	$0.00	$6,121.95
17201017321493	07/01/09-09/30/09	$3,856.00	$96.03	$2,120.80	$0.00	$6,072.83
17201017321494	10/01/09-12/31/09	$3,856.00	$52.40	$2,120.08	$0.00	$6,029.20
17201100738715	01/01/10-03/31/10	$10,000.00	$254.25	$5,500.00	$0.00	$15,754.25
17201100738714	04/01/10-06/30/10	$10,000.00	$156.71	$5,500.00	$0.00	$15,656.71
	Total	$65,689.00	$5,659.94	$37,128.23	$0.00	$106,239.43

The petitioner is a corporation based in Virginia. The petitioner is a direct marketer that sells consumer electronics through the Internet from locations entirely outside of Ohio. The petitioner ships its merchandise via the U.S. Mail or using common carriers. The petitioner is not incorporated in Ohio and does not have physical facilities, offices, or showrooms in Ohio. The petitioner has no employees in Ohio and does not own or lease property in Ohio. A review of the petitioner's website indicates that the petitioner sends free catalogs to U.S. resident customers.

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JAN 26 2012

Information in the possession of the Tax Commissioner shows that the petitioner had more than $500,000 in sales to customers in Ohio and that it failed to file and pay the commercial activity tax required by R.C. 5751.02(A).

The petitioner initially requested a personal appearance hearing. The petitioner subsequently requested a telephone hearing that was conducted on August 9, 2011. During the hearing, the petitioner's representative stated that the facts in the case were identical to the facts presented by another Internet retailer in its petition for reassessment, for which an appeal was pending at the Ohio Board of Tax Appeals.

The petitioner contends that it is not subject to the commercial activity tax, and requests cancellation of the assessments. This contention is not well taken. In summary, the petitioner is subject to the tax because it has "substantial nexus with this state," as that phrase is defined in R.C. 5751.01(H). The petitioner satisfies the third and/or fourth conditions in that division, and therefore is a person on whom the tax is levied. The petitioner sells consumer goods through orders received via the Internet and telephone orders. While the petitioner admits that it has customers in Ohio to which it sells and ships these goods, it asserts that it has no activities or contacts in Ohio which rise to the level necessary for Ohio to constitutionally impose the tax.

Effective June 30, 2005, R.C. 5751.02(A) levies the commercial activity tax

> * * * on each person with taxable gross receipts for the privilege of doing business in this state. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during the calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state.

Pursuant to R.C. 5751.01(H), a person has "substantial nexus with this state" if the person meets any of the following conditions:

(1) Owns or uses a part or all of its capital in this state;
(2) Holds a certificate of compliance with the laws of this state authorizing the person to do business in this state;
(3) Has bright-line presence in this state;
(4) Otherwise has nexus with this state to an extent that the person can be required to remit the tax imposed under this chapter under the Constitution of the United States.

Pursuant to R.C. 5751.01(I), a person "has bright-line presence" in this state for a reporting period if the person meets any of the following conditions:

(1) Has at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars. * * *
(2) Has during the calendar year payroll in this state of at least fifty thousand dollars. * * *
(3) Has during the calendar year taxable gross receipts of at least five hundred thousand dollars.

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(4) Has at any time during the calendar year within this state at least twenty-five percent of the person's total property, total payroll, or total gross receipts.
(5) Is domiciled in this state as an individual or for corporate, commercial, or other business purposes.

Division (F) of R.C. 5751.01 defines gross receipts as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person * * * [including] [a]mounts realized from the sale, exchange, or other disposition of the taxpayer's property to or with another." Specifically excluded from gross receipts are "any receipts for which the tax imposed by this chapter is prohibited by the Constitution or laws of the United States or the Constitution of Ohio." R.C. 5751.01(F)(2)(aa) (formerly R.C. 5751.01(F)(2)(z)).

"Taxable gross receipts" is defined as gross receipts sitused to this state under R.C. 5751.033. For purposes of the petitioner, division (E) applies:

> Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by common carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has completed shall be considered the place where the purchaser receives the property. * * *

The petitioner's overriding assertion is that the Commerce Clause of the United States Constitution precludes the State of Ohio from subjecting it to the commercial activity tax under the authority of R.C. 5751.01(H)(3) or (4). The petitioner contends that imposition of the tax pursuant to either (H)(3) or (H)(4) is improper because the petitioner allegedly does not have the nexus with Ohio that is required under the Commerce Clause. The petitioner asserts that the nexus required is a "physical presence" in the taxing state, which it alleges it did not have during the assessed periods.

To the extent that the petitioner is challenging the constitutionality of R.C. 5751.01(H)(3), (4) and/or R.C.5751.01(I)(3), the Commissioner is without jurisdiction to adjudicate the constitutionality of those statutes. However, the laws of Ohio are presumed to be constitutional. See *State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567. Moreover, a discussion of the constitutional issues is particularly warranted for two reasons. First, R.C. 5751.01(H)(4) requires the commercial activity tax to be imposed to the fullest extent permissible under the Constitution. Second, regardless of R.C. 5751.01(H)(4), compliance with constitutional limitations on state taxation is the sine qua non of any tax assessment.

The Tax Commissioner's assessments have been computed based on information in the Tax Commissioner's possession. By the petitioner's own admission and by information available at the petitioner's website, the goods sold were delivered by common carrier to their ultimate destination in Ohio. Thus, they were "received in this state" and were "taxable gross receipts" within the meaning of R.C. 5751.033(E) and R.C. 5751.01(I)(3). For each calendar year at issue, based on information in the possession of the Tax Commissioner, taxable gross receipts exceeded $500,000.00, so the petitioner had "bright-line presence" pursuant to R.C. 5751.01

(H)(3) and R.C. 5751.01(I)(3). Therefore, the petitioner had "substantial nexus with this state" and was subject to the tax because it had taxable gross receipts exceeding $500,000.00 in each calendar year.

The petitioner contends that application of the commercial activity tax to it would violate the Commerce Clause since the petitioner allegedly does not possess the "bright-line" physical presence in Ohio required by *National Bellas Hess v. Ill. Rev. Dep't* (1967), 386 U.S. 753 and *Quill Corp. v. North Dakota* (1992), 504 U.S. 298. In *Quill*, the Court held that North Dakota's attempt to require an out-of-state mail order company with no physical presence in the state to collect and remit use tax violated the "substantial nexus" requirement of the Commerce Clause. However, in the years since *Quill*, the Court has not extended its holding to other taxes, including income taxes or gross receipts taxes. The highest court in most, but not all, states that have considered the issue, including Ohio, has found that *Quill* applies only to sales and use taxes. See *Couchot v. State Lottery Commission* (1996), 74 Ohio St.3d 417 (finding that the physical-presence requirement of *Quill* was not applicable to taxation of Ohio Lottery winnings of a nonresident, because *Quill* applied only to sales and use taxes, although the requirement would have been satisfied anyway by virtue of the winner's purchase and redemption of the winning ticket in Ohio in a prior year). See also, for example, *Geoffrey v. South Carolina* (1993), 437 S.E.2d 13, *A & F Trademark, Inc. v. Tolson* (2004), 167 N.C. App. 150, *LANCO, Inc. v. Dir., Div. of Taxation* (2006), 908 A.2d 176, *Tax Comm'r v. MBNA America Bank* (2006), 220 W.Va. 163, and *Capital One Bank v. Commissioner* (2009), 453 Mass. 1.

The petitioner contends that even if the holding of *Quill* is limited to the sales and use tax context, that holding should apply to the commercial activity tax. However, the Supreme Court of Ohio recently found that the commercial activity tax is not, as the petitioner asserts, the functional equivalent of a sales tax. See *Ohio Grocers Ass'n v. Levin* (2009), 123 Ohio St.3d 303 (holding that the tax is not an excise tax "upon the sale or purchase of food"). Therefore, the *Quill* requirement of physical presence does not apply to the commercial activity tax.

In order to be constitutionally valid, the assessments herein must still satisfy the "substantial nexus" requirement of the Commerce Clause. The petitioner's continuous, systematic, and significant solicitation and this exploitation of the economic marketplace in Ohio is sufficient for this purpose. Therefore, under established Commerce Clause jurisprudence, the imposition of the tax measured by those receipts is not prohibited by the laws or Constitution of either the United States or Ohio.

Lastly, the petitioner contends that even if it was subject to the tax and required to file returns and pay the amounts due, the assessed penalties should be abated in full due to its reasonable reliance on its interpretation of constitutional principles limiting state taxation. The petitioner was assessed penalty pursuant to R.C. 5751.06(A), (B)(1), and (D). The Tax Commissioner may abate these penalties pursuant to R.C. 5751.06(F). The petitioner's contention is not well taken.

Accordingly, the assessments are affirmed.

Current records indicate that no additional payments have been made on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made

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payable to "Ohio Treasurer Josh Mandel." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Commercial Activity Tax Division, P.O. Box 16678, Columbus, OH 43216-6678.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL

JOSEPH W. TESTA
TAX COMMISSIONER

/s/ Joseph W. Testa

Joseph W. Testa
Tax Commissioner

Exhibit 8

Case #2

RECEIVED
SEP 10 2012
OHIO DEPARTMENT OF TAXATION
OFFICE OF THE TAX COMMISSIONER

BEFORE THE OHIO BOARD OF TAX APPEALS

CRUTCHFIELD, INC., 1 Crutchfield Park Charlottesville, VA 22911 Appellant, vs. **JOSEPH W. TESTA,** Tax Commissioner of Ohio 30 East Broad Street, 22nd Floor Columbus, OH 43215, Appellee.	))))))))))))))	BTA Case No._____ (COMMERCIAL ACTIVITY TAX) Amount in Controversy: Total Tax, Penalties, and Pre-Assessment Interest of $60,988.50, Plus Post-Assessment Interest.

FILED
SEP 10 2012
BOARD OF TAX APPEALS
COLUMBUS, OHIO

NOTICE OF APPEAL

Martin I. Eisenstein (Maine Reg. 003027)
(application for Pro Hac Vice Admission to be filed)
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LEGAL COUNSEL FOR APPELLANT,
CRUTCHFIELD, INC.

HAND DELIVERED

Pursuant to Section 5717.02 of the Ohio Revised Code ("R.C."), Crutchfield, Inc. ("Crutchfield" or the "Company") hereby gives notice of appeal to the Ohio Board of Tax Appeals ("the Board") from a final determination dated July 26, 2012 ("Determination") issued by Joseph W. Testa, Tax Commissioner of the State of Ohio ("Commissioner") that affirmed assessments of Ohio Commercial Activity Tax ("CAT") against Crutchfield with respect to the following tax periods: (1) July 1, 2010 through September 30, 2010; (2) October 1, 2010 through December 31, 2010; (3) January 1, 2011 through March 31, 2011; (4) April 1, 2011 through June 30, 2011; and (5) July 1, 2011 through September 30, 2011 (together, the "Tax Periods"). A copy of the Determination is attached hereto as required by statute. *See* Exhibit A.

BACKGROUND

1. Crutchfield is an online retailer with no connection to the State of Ohio. It sells its goods through the Internet from locations entirely outside of the state.

2. While some of Crutchfield's customers reside in Ohio, Crutchfield itself has no personnel, agents, representatives, or property of any kind in Ohio, and makes no sales from within the State of Ohio.

3. As a result, Crutchfield is protected from imposition of the Commercial Activity Tax ("CAT") under the Commerce Clause of the United States Constitution. The United States Supreme Court has made clear that a state lacks the power under the Commerce Clause to impose a gross receipts tax on a company with no physical presence in the state. *Tyler Pipe Industries, Inc. v. Wash. Dep't of Revenue*, 483 U.S. 232, 250 (1987). This "bright line," physical presence standard derives from constitutional principles and authorities set forth by the Court in *National Bellas Hess v. Ill. Dep't of Revenue*, 386 U.S. 753 (1967), and subsequently reaffirmed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

4. As it applies to gross receipts taxes like the CAT, the Court has made clear that the physical presence standard is only satisfied through in-state activities by, or on behalf of, the taxpayer that are significantly associated with its ability to establish and maintain a market in the state. *Tyler Pipe,* 483 U.S. at 250; *Standard Pressed Steel, Inc. v. Wash. Dep't of Revenue*, 419 U.S. 560, 562-64 (1975) (sufficient nexus for gross receipts tax established through presence of full-time employee in the state calling on customers); *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 617, 626 (1981) (citing *Bellas Hess* for threshold of state taxing power for gross receipts tax purposes, and finding sufficient presence); *see also Norton Co. v. Ill. Dep't of Revenue,* 340 U.S. 534, 537 (state lacks authority to impose gross receipts tax on a company with no "local incident" in the state). The Supreme Court relied upon *Tyler Pipe, Standard Pressed Steel*, and *Commonwealth Edison* in upholding the physical presence test for sales and use taxes in *Quill*, and the Court has never held that a state has the power under the Commerce Clause to impose gross receipts tax on a company based on any lesser, or different standard than the "bright line," physical presence test of *Tyler Pipe* and *Quill*. Because Crutchfield lacks the necessary physical presence in Ohio required under the Commerce Clause, it is not subject to the CAT, and the assessments against it should be cancelled.

5. In addition to its constitutional protections, Crutchfield also submits that it does not satisfy the statutory requirements for imposition of Ohio's Commercial Activity Tax (the "CAT") inasmuch as it does not satisfy the in-state activity requirements that underpin the imposition of such tax.

6. Read as a whole, the CAT seeks to tax in-state business activities, not those between Ohio residents and those companies, like Crutchfield, having no in-state presence whatsoever. Moreover, even if it were to be held that the CAT statutes were ambiguous as to

their application to out-of-state companies like Crutchfield, "there is one fundamental precept which still obtains in the interpretation of taxation statutes, to wit, that in case of doubt, such doubt is to be resolved in favor of the taxpayer." *Stephens v. Glander*, 151 Ohio St. 62, 84 N.E.2d 279, 281 (1949).

7. Crutchfield submits that, when all doubts are resolved in its favor as required by law, the Determination against it should be vacated in its entirety and the assessments cancelled.

8. Further, Crutchfield submits that any penalty sought to be imposed on the Company should be rescinded because: (1) it was reasonable for Crutchfield to conclude that Ohio's attempt to export a domestic tax to a foreign corporation with no in-state presence violated state and federal law; and (2) Crutchfield's reliance on well established legal principles, including the United States Supreme Court bright-line "substantial nexus" rule was justified and appropriate in light of Ohio's unprecedented attempt to impose the CAT on non-resident mail order and Internet sellers.

THE FINAL DETERMINATION

9. In support of his finding that Crutchfield was subject to the CAT, despite its lack of physical presence in Ohio, for each of the Tax Periods, the Commissioner rested the Determination on the following grounds:

10. First, the Determination concluded that Crutchfield had "substantial nexus" with Ohio as that term is defined in the statute [*see* R.C. 5751.01(H)], based on the "bright-line presence" test set forth in R.C. 5751.03(I)(3). [Determination at 3.] The Commissioner concluded that "the petitioner had 'substantial nexus with this state' and was subject to the tax because it had taxable gross receipts exceeding $500,000.00 in each calendar year." *Id.* at 3.

11. There was no other "bright-line" statutory basis for the Determination's conclusion that Crutchfield owed CAT for the Tax Period.

12. The Commissioner concluded that "[u]nder established Commerce Clause jurisprudence, the imposition of the tax measured by those receipts is not prohibited by the laws or the Constitution of either the United States or Ohio." [*Id* at 4.]

13. Each of the grounds given by the Commissioner for the Determination is in error.

ASSIGNMENTS OF ERROR

1. Because Crutchfield engages in no commercial activity within the State of Ohio and, likewise, neither owns nor leases property in the state, either directly or indirectly, the Company is not "doing business in this state" under R.C. § 5751.02. The Commercial Activity Tax, therefore, does not apply.

2. Crutchfield lacked a "substantial nexus with this state" under R.C. § 5751.01(H) inasmuch as it: (a) neither owned nor used "part or all of its capital in this state" [R.C. 5751.01(H)(1)]; (b) lacks a "certificate of compliance with the laws of this state authorizing [it] to do business in this state" [R.C. 5751.01(H)(2)]; and (c) does not "otherwise [have] nexus in this state … under the constitution [sic] of the United States." [R.C. 5751.01(H)(4)].

3. Crutchfield lacked a "'bright-line presence' in this state" under R.C. § 5751.01(H)(3) & (I) inasmuch as it did not have: (a) "at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars" [R.C. 5751.01(I)(1)]; (b) "during the calendar year payroll in this state of at least fifty thousand dollars" [R.C. 5751.01(I)(2)]; (c) during the calendar year "taxable gross receipts of at least five hundred thousand dollars," inasmuch as (i) none of its gross receipts are subject to taxation in Ohio; and (ii) it had no taxable sales within the State of Ohio [R.C. 5751.01(I)(3)]; or (d)

"during the calendar year within this state at least twenty-five per cent [sic] of the person's total property, total payroll, or total receipts." [R.C. 5751.01(I)(4)]. In addition, Crutchfield was not "domiciled in this state as an individual or for corporate, commercial, or other business purposes." [R.C. 5751.01(I)(5)].

4. Crutchfield's receipts are not subject to taxation because, under R.C. § 5751.01(F)(2)(ff), such tax is "prohibited by the Constitution or laws of the United States ..."

5. Ohio statutes should be interpreted to avoid the imposition of the CAT on Crutchfield, inasmuch as imposing the tax on Crutchfield would violate the Company's rights under the Commerce Clause of the United States Constitution, as discussed below. It is the duty of those charged with interpreting and applying a law to construe it so as to "prevent a declaration of unconstitutionality." *Conold v. Stern*, 138 Ohio St. 352, 25 N.E.2d 133, 143 (1941) (citation omitted). Only by excluding Crutchfield from the reach of the CAT can the constitutionality of the tax be preserved.

6. Application of the CAT to Crutchfield would violate the Company's rights under the Commerce Clause of the United States Constitution since Crutchfield does not possess the requisite "bright-line" physical presence in Ohio. The Supreme Court has made clear that a state lacks the power under the Commerce Clause to impose a gross receipts tax on a company with no physical presence in the state. *Tyler Pipe*, 483 U.S. at 250 (1987) ("the crucial factor governing nexus is whether <u>the activities performed in this state on behalf of the taxpayer</u> are significantly associated with the taxpayer's ability to establish and maintain a market in this State") (internal citation omitted and emphasis added); *Standard Pressed Steel*, 419 U.S. at 562-64 (1975) (sufficient nexus for gross receipts tax established through presence of full-time employee in the state calling on customers); *Commonwealth Edison Co. v. Montana*, 453 U.S.

609 (1981) (applying the bright-line rule to a general revenue tax on the value of coal extracted from the state, and finding that "the interstate business must have a substantial nexus with the State before any tax may be levied on it"). This physical presence standard derives from constitutional principles and authorities set forth by the Court in *National Bellas Hess* and subsequently reaffirmed in *Quill*. The Supreme Court relied upon *Tyler Pipe, Standard Pressed Steel*, and *Commonwealth Edison* in upholding the physical presence test for sales and use taxes in *Quill*, and the Court has never held that a state has the power under the Commerce Clause to impose gross receipts tax on a company based on any lesser, or different standard than physical presence test of *Tyler Pipe* and *Quill*. Since the bright-line physical presence test applies to taxes like the CAT, the assessments are void in their entirety, and the Determination should be vacated.

7. The Commissioner's assessment of the "failing to register penalty" is erroneous and unlawful in that Crutchfield was not required to register for the CAT because Crutchfield was not a "person subject to" chapter 5751 of the Revised Code. R.C. 5751.04(B).

8. The penalty should be abated. The Commissioner erred in arbitrarily and capriciously asserting penalties for each of the aforesaid reasons, and in light of Crutchfield's good faith reliance upon existing federal constitutional law in regard to the application of the "substantial nexus" test to cases involving gross receipts taxes, as well as sales and use taxes and other state taxes.

REQUEST FOR HEARING

Appellant Crutchfield requests that the Board of Tax Appeals or its attorney examiners conduct a *de novo* hearing in Columbus, Ohio in connection with these assignments of error.

REQUEST FOR RELIEF

Crutchfield respectfully asks that the Determination be vacated in its entirety, that the assessments against Crutchfield for the Tax Periods cancelled, that the Commissioner be barred from asserting CAT liability against Crutchfield for the Tax Periods, and that Crutchfield be awarded such other relief as is just and equitable.

Respectfully submitted,

Martin I. Eisenstein (Maine Reg. 0017878)
(application for Pro Hac Vice Admission to be filed)

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slsmiseck@vorys.com

LEGAL COUNSEL FOR APPELLANT, CRUTCHFIELD, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this Notice of Appeal has been filed, via hand delivery, with Joseph W. Testa, Tax Commissioner of Ohio, 30 East Broad Street, 22nd Floor, Columbus, Ohio, on this 10th day of September, 2012.

Steven L. Smiseck (0061615)

EXHIBIT A

0000000113

FINAL DETERMINATION

Date: JUL 2 6 2012

Crutchfield Corporation
1 Crutchfield Park
Charlottesville, VA 22911

Re: Five Assessments
Commercial Activity Tax
Taxpayer ID No. 96059827
Tax Periods: 2010 - 2011

This is the final determination of the Tax Commissioner on five petitions for reassessment filed pursuant to R.C. 5751.09 concerning the following commercial activity tax assessments:

Assessment No.	Period	Tax	Interest	Penalty	Payments	Total
17201131820313	07/01/10-09/30/10	$10,000.00	$393.42	$2,000.00	$0.00	$12,393.42
17201131820314	10/01/10-12/31/10	$10,000.00	$291.51	$2,000.00	$0.00	$12,291.51
17201131820315	01/01/11-03/31/11	$10,000.00	$195.07	$2,000.00	$0.00	$12,195.07
17201131820316	04/01/11-06/30/11	$10,000.00	$94.25	$2,000.00	$0.00	$12,094.25
17201133443980	07/01/11-09/30/11	$10,000.00	$14.25	$2,000.00	$0.00	$12,014.25
	Total	$50,000.00	$988.50	$10,000.00	$0.00	$60,988.50

The petitioner is a corporation based in Virginia. The petitioner is a direct marketer that sells consumer electronics through the Internet from locations entirely outside of Ohio. The petitioner ships its merchandise via the U.S. Mail or using common carriers. The petitioner is not incorporated in Ohio and does not have physical facilities, offices, or showrooms in Ohio. The petitioner has no employees in Ohio and does not own or lease property in Ohio. A review of the petitioner's website indicates that the petitioner sends free catalogs to U.S. resident customers. Information in the possession of the Tax Commissioner shows that the petitioner had more than $500,000 in sales to customers in Ohio and that it failed to file and pay the commercial activity tax required by R.C. 5751.02(A).

The petitioner waived its right to a hearing, therefore the matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied along with the petition.

The petitioner contends that it is not subject to the commercial activity tax, and requests cancellation of the assessments. This contention is not well taken. In summary, the petitioner is subject to the tax because it has "substantial nexus with this state," as that phrase is defined in R.C. 5751.01(H). The petitioner satisfies the third and/or fourth conditions in that division, and therefore is a person on whom the tax is levied. The petitioner sells consumer goods through orders received via the Internet and telephone orders. While the petitioner admits that it has customers in Ohio to which it sells and ships these goods, it asserts that it has no activities or contacts in Ohio which rise to the level necessary for Ohio to constitutionally impose the tax.

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Effective June 30, 2005, R.C. 5751.02(A) levies the commercial activity tax

> * * * on each person with taxable gross receipts for the privilege of doing business in this state. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during the calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state.

Pursuant to R.C. 5751.01(H), a person has "substantial nexus with this state" if the person meets any of the following conditions:

(1) Owns or uses a part or all of its capital in this state;
(2) Holds a certificate of compliance with the laws of this state authorizing the person to do business in this state;
(3) Has bright-line presence in this state;
(4) Otherwise has nexus with this state to an extent that the person can be required to remit the tax imposed under this chapter under the Constitution of the United States.

Pursuant to R.C. 5751.01(I), a person "has bright-line presence" in this state for a reporting period if the person meets any of the following conditions:

(1) Has at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars. * * *
(2) Has during the calendar year payroll in this state of at least fifty thousand dollars. * * *
(3) Has during the calendar year taxable gross receipts of at least five hundred thousand dollars.

(4) Has at any time during the calendar year within this state at least twenty-five percent of the person's total property, total payroll, or total gross receipts.
(5) Is domiciled in this state as an individual or for corporate, commercial, or other business purposes.

Division (F) of R.C. 5751.01 defines gross receipts as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person * * * [including] [a]mounts realized from the sale, exchange, or other disposition of the taxpayer's property to or with another." Specifically excluded from gross receipts are "any receipts for which the tax imposed by this chapter is prohibited by the Constitution or laws of the United States or the Constitution of Ohio." R.C. 5751.01(F)(2)(aa) (formerly R.C. 5751.01(F)(2)(z)).

"Taxable gross receipts" is defined as gross receipts sitused to this state under R.C. 5751.033. For purposes of the petitioner, division (E) applies:

> Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by common carrier or by other means of transportation,

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> the place at which such property is ultimately received after all transportation has completed shall be considered the place where the purchaser receives the property. * * *

The petitioner's overriding assertion is that the Commerce Clause of the United States Constitution precludes the State of Ohio from subjecting it to the commercial activity tax under the authority of R.C. 5751.01(H)(3) or (4). The petitioner contends that imposition of the tax pursuant to either (H)(3) or (H)(4) is improper because the petitioner allegedly does not have the nexus with Ohio that is required under the Commerce Clause. The petitioner asserts that the nexus required is a "physical presence" in the taxing state, which it alleges it did not have during the assessed periods.

To the extent that the petitioner is challenging the constitutionality of R.C. 5751.01(H)(3), (4) and/or R.C.5751.01(I)(3), the Commissioner is without jurisdiction to adjudicate the constitutionality of those statutes. However, the laws of Ohio are presumed to be constitutional. See *State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567. Moreover, a discussion of the constitutional issues is particularly warranted for two reasons. First, R.C. 5751.01(H)(4) requires the commercial activity tax to be imposed to the fullest extent permissible under the Constitution. Second, regardless of R.C. 5751.01(H)(4), compliance with constitutional limitations on state taxation is the sine qua non of any tax assessment.

The Tax Commissioner's assessments have been computed based on information in the Tax Commissioner's possession. By the petitioner's own admission and by information available at the petitioner's website, the goods sold were delivered by common carrier to their ultimate destination in Ohio. Thus, they were "received in this state" and were "taxable gross receipts" within the meaning of R.C. 5751.033(E) and R.C. 5751.01(I)(3). For each calendar year at issue, based on information in the possession of the Tax Commissioner, taxable gross receipts exceeded $500,000.00, so the petitioner had "bright-line presence" pursuant to R.C. 5751.01 (H)(3) and R.C. 5751.01(I)(3). Therefore, the petitioner had "substantial nexus with this state" and was subject to the tax because it had taxable gross receipts exceeding $500,000.00 in each calendar year.

The petitioner contends that application of the commercial activity tax to it would violate the Commerce Clause since the petitioner allegedly does not possess the "bright-line" physical presence in Ohio required by *National Bellas Hess v. Ill. Rev. Dep't* (1967), 386 U.S. 753 and *Quill Corp. v. North Dakota* (1992), 504 U.S. 298. In *Quill*, the Court held that North Dakota's attempt to require an out-of-state mail order company with no physical presence in the state to collect and remit use tax violated the "substantial nexus" requirement of the Commerce Clause. However, in the years since *Quill*, the Court has not extended its holding to other taxes, including income taxes or gross receipts taxes. The highest court in most, but not all, states that have considered the issue, including Ohio, has found that *Quill* applies only to sales and use taxes. See *Couchot v. State Lottery Commission* (1996), 74 Ohio St.3d 417 (finding that the physical-presence requirement of *Quill* was not applicable to taxation of Ohio Lottery winnings of a nonresident, because *Quill* applied only to sales and use taxes, although the requirement would have been satisfied anyway by virtue of the winner's purchase and redemption of the winning ticket in Ohio in a prior year). See also, for example, *Geoffrey v. South Carolina* (1993), 437 S.E.2d 13, *A & F Trademark, Inc. v. Tolson* (2004), 167 N.C. App. 150, *LANCO, Inc. v. Dir., Div. of Taxation* (2006), 908 A.2d 176, *Tax Comm'r v. MBNA America Bank* (2006), 220 W.Va. 163, and *Capital One Bank v. Commissioner* (2009), 453 Mass. 1.

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The petitioner contends that even if the holding of *Quill* is limited to the sales and use tax context, that holding should apply to the commercial activity tax. However, the Supreme Court of Ohio recently found that the commercial activity tax is not, as the petitioner asserts, the functional equivalent of a sales tax. See *Ohio Grocers Ass'n v. Levin* (2009), 123 Ohio St.3d 303 (holding that the tax is not an excise tax "upon the sale or purchase of food"). Therefore, the *Quill* requirement of physical presence does not apply to the commercial activity tax.

In order to be constitutionally valid, the assessments herein must still satisfy the "substantial nexus" requirement of the Commerce Clause. The petitioner's continuous, systematic, and significant solicitation and this exploitation of the economic marketplace in Ohio is sufficient for this purpose. Therefore, under established Commerce Clause jurisprudence, the imposition of the tax measured by those receipts is not prohibited by the laws or Constitution of either the United States or Ohio.

Lastly, the petitioner contends that even if it was subject to the tax and required to file returns and pay the amounts due, the assessed penalties should be abated in full due to its reasonable reliance on its interpretation of constitutional principles limiting state taxation. The petitioner was assessed penalties pursuant to R.C. 5751.06(A), (B)(1), and (D). The Tax Commissioner may abate these penalties pursuant to R.C. 5751.06(F). The petitioner's contention is not well taken.

Accordingly, the assessments are affirmed.

Current records indicate that no payments have been made on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Ohio Treasurer Josh Mandel." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Commercial Activity Tax Division, P.O. Box 16678, Columbus, OH 43216-6678.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL

JOSEPH W. TESTA
TAX COMMISSIONER

/s/ Joseph W. Testa

Joseph W. Testa
Tax Commissioner

Exhibit 9

RECEIVED
JUN 26 2013
OHIO DEPARTMENT OF TAXATION
OFFICE OF THE TAX COMMISSIONER

BEFORE THE OHIO BOARD OF TAX APPEALS

CRUTCHFIELD, INC., 1 Crutchfield Park Charlottesville, VA 22911 Appellant, vs. **JOSEPH W. TESTA,** Tax Commissioner of Ohio 30 East Broad Street, 22nd Floor Columbus, OH 43215, Appellee.	)))))))))))))))	BTA Case No._____ (COMMERCIAL ACTIVITY TAX) Amount in Controversy: Total Tax, Penalties, and Pre-Assessment Interest of $39,703.01, Plus Post-Assessment Interest.

NOTICE OF APPEAL

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LEGAL COUNSEL FOR APPELLANT,
CRUTCHFIELD, INC.

Pursuant to Section 5717.02 of the Ohio Revised Code ("R.C."), Crutchfield, Inc. ("Crutchfield" or the "Company") hereby gives notice of appeal to the Ohio Board of Tax Appeals ("the Board") from a final determination dated May 1, 2013 ("Determination") issued by Joseph W. Testa, Tax Commissioner of the State of Ohio ("Commissioner") that affirmed assessments of Ohio Commercial Activity Tax ("CAT") against Crutchfield with respect to the following tax periods: (1) October 1, 2011 through December 31, 2011; (2) January 1, 2012 through March 31, 2012; and (3) April 1, 2012 through June 30, 2012 (together, the "Tax Periods"). A copy of the Determination is attached hereto as required by statute. *See* Exhibit A.

BACKGROUND

1. Crutchfield is an online retailer with no connection to the State of Ohio. It sells its goods through the Internet from locations entirely outside of the state.

2. While some of Crutchfield's customers reside in Ohio, Crutchfield itself has no personnel, agents, representatives, or property of any kind in Ohio, and makes no sales from within the State of Ohio.

3. As a result, Crutchfield is protected from imposition of the Commercial Activity Tax ("CAT") under the Commerce Clause of the United States Constitution. The United States Supreme Court has made clear that a state lacks the power under the Commerce Clause to impose a gross receipts tax on a company with no physical presence in the state. *Tyler Pipe Industries, Inc. v. Wash. Dep't of Revenue*, 483 U.S. 232, 250 (1987). This "bright line," physical presence standard derives from constitutional principles and authorities set forth by the Court in *National Bellas Hess v. Ill. Dep't of Revenue*, 386 U.S. 753 (1967), and subsequently reaffirmed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

4. As it applies to gross receipts taxes like the CAT, the Court has made clear that the physical presence standard is only satisfied through in-state activities by, or on behalf of, the taxpayer that are significantly associated with its ability to establish and maintain a market in the state. *Tyler Pipe,* 483 U.S. at 250; *Standard Pressed Steel, Inc. v. Wash. Dep't of Revenue*, 419 U.S. 560, 562-64 (1975) (sufficient nexus for gross receipts tax established through presence of full-time employee in the state calling on customers); *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 617, 626 (1981) (citing *Bellas Hess* for threshold of state taxing power for gross receipts tax purposes, and finding sufficient presence); *see also Norton Co. v. Ill. Dep't of Revenue,* 340 U.S. 534, 537 (state lacks authority to impose gross receipts tax on a company with no "local incident" in the state). The Supreme Court relied upon *Tyler Pipe, Standard Pressed Steel*, and *Commonwealth Edison* in upholding the physical presence test for sales and use taxes in *Quill*, and the Court has never held that a state has the power under the Commerce Clause to impose gross receipts tax on a company based on any lesser, or different standard than the "bright line," physical presence test of *Tyler Pipe* and *Quill*. Because Crutchfield lacks the necessary physical presence in Ohio required under the Commerce Clause, it is not subject to the CAT, and the assessments against it should be cancelled.

5. In addition to its constitutional protections, Crutchfield also submits that it does not satisfy the statutory requirements for imposition of Ohio's Commercial Activity Tax (the "CAT") inasmuch as it does not satisfy the in-state activity requirements that underpin the imposition of such tax.

6. Read as a whole, the CAT seeks to tax in-state business activities, not those between Ohio residents and those companies, like Crutchfield, having no in-state presence whatsoever. Moreover, even if it were to be held that the CAT statutes were ambiguous as to

their application to out-of-state companies like Crutchfield, "there is one fundamental precept which still obtains in the interpretation of taxation statutes, to wit, that in case of doubt, such doubt is to be resolved in favor of the taxpayer." *Stephens v. Glander*, 151 Ohio St. 62, 84 N.E.2d 279, 281 (1949).

7. Crutchfield submits that, when all doubts are resolved in its favor as required by law, the Determination against it should be vacated in its entirety and the assessments cancelled.

8. Further, Crutchfield submits that any penalty sought to be imposed on the Company should be rescinded because: (1) it was reasonable for Crutchfield to conclude that Ohio's attempt to export a domestic tax to a foreign corporation with no in-state presence violated state and federal law; and (2) Crutchfield's reliance on well established legal principles, including the United States Supreme Court bright-line "substantial nexus" rule was justified and appropriate in light of Ohio's unprecedented attempt to impose the CAT on non-resident mail order and Internet sellers.

THE FINAL DETERMINATION

9. In support of his finding that Crutchfield was subject to the CAT, despite its lack of physical presence in Ohio, for each of the Tax Periods, the Commissioner rested the Determination on the following grounds:

10. First, the Determination concluded that Crutchfield had "substantial nexus" with Ohio as that term is defined in the statute [*see* R.C. 5751.01(H)], based on the "bright-line presence" test set forth in R.C. 5751.03(I)(3). [Determination at 3.] The Commissioner concluded that "the petitioner had 'substantial nexus with this state' and was subject to the tax because it had taxable gross receipts exceeding $500,000.00 in each calendar year." *Id.* at 3.

11. There was no other "bright-line" statutory basis for the Determination's conclusion that Crutchfield owed CAT for the Tax Period.

12. The Commissioner concluded that "[u]nder established Commerce Clause jurisprudence, the imposition of the tax measured by those receipts is not prohibited by the laws or the Constitution of either the United States or Ohio." [*Id.* at 4.]

13. Each of the grounds given by the Commissioner for the Determination is in error.

ASSIGNMENTS OF ERROR

1. Because Crutchfield engages in no commercial activity within the State of Ohio and, likewise, neither owns nor leases property in the state, either directly or indirectly, the Company is not "doing business in this state" under R.C. § 5751.02. The Commercial Activity Tax, therefore, does not apply.

2. Crutchfield lacked a "substantial nexus with this state" under R.C. § 5751.01(H) inasmuch as it: (a) neither owned nor used "part or all of its capital in this state" [R.C. 5751.01(H)(1)]; (b) lacks a "certificate of compliance with the laws of this state authorizing [it] to do business in this state" [R.C. 5751.01(H)(2)]; and (c) does not "otherwise [have] nexus in this state ... under the constitution [sic] of the United States." [R.C. 5751.01(H)(4)].

3. Crutchfield lacked a "'bright-line presence' in this state" under R.C. § 5751.01(H)(3) & (I) inasmuch as it did not have: (a) "at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars" [R.C. 5751.01(I)(1)]; (b) "during the calendar year payroll in this state of at least fifty thousand dollars" [R.C. 5751.01(I)(2)]; (c) during the calendar year "taxable gross receipts of at least five hundred thousand dollars," inasmuch as (i) none of its gross receipts are subject to taxation in Ohio; and (ii) it had no taxable sales within the State of Ohio [R.C. 5751.01(I)(3)]; or (d)

"during the calendar year within this state at least twenty-five per cent [sic] of the person's total property, total payroll, or total receipts." [R.C. 5751.01(I)(4)]. In addition, Crutchfield was not "domiciled in this state as an individual or for corporate, commercial, or other business purposes." [R.C. 5751.01(I)(5)].

4. Crutchfield's receipts are not subject to taxation because, under R.C. § 5751.01(F)(2)(ff), such tax is "prohibited by the Constitution or laws of the United States ..."

5. Ohio statutes should be interpreted to avoid the imposition of the CAT on Crutchfield, inasmuch as imposing the tax on Crutchfield would violate the Company's rights under the Commerce Clause of the United States Constitution, as discussed below. It is the duty of those charged with interpreting and applying a law to construe it so as to "prevent a declaration of unconstitutionality." *Conold v. Stern*, 138 Ohio St. 352, 25 N.E.2d 133, 143 (1941) (citation omitted). Only by excluding Crutchfield from the reach of the CAT can the constitutionality of the tax be preserved.

6. Application of the CAT to Crutchfield would violate the Company's rights under the Commerce Clause of the United States Constitution since Crutchfield does not possess the requisite "bright-line" physical presence in Ohio. The Supreme Court has made clear that a state lacks the power under the Commerce Clause to impose a gross receipts tax on a company with no physical presence in the state. *Tyler Pipe*, 483 U.S. at 250 (1987) ("the crucial factor governing nexus is whether <u>the activities performed in this state on behalf of the taxpayer</u> are significantly associated with the taxpayer's ability to establish and maintain a market in this State") (internal citation omitted and emphasis added); *Standard Pressed Steel*, 419 U.S. at 562-64 (1975) (sufficient nexus for gross receipts tax established through presence of full-time employee in the state calling on customers); *Commonwealth Edison Co. v. Montana*, 453 U.S.

609 (1981) (applying the bright-line rule to a general revenue tax on the value of coal extracted from the state, and finding that "the interstate business must have a substantial nexus with the State before any tax may be levied on it"). This physical presence standard derives from constitutional principles and authorities set forth by the Court in *National Bellas Hess* and subsequently reaffirmed in *Quill*. The Supreme Court relied upon *Tyler Pipe, Standard Pressed Steel*, and *Commonwealth Edison* in upholding the physical presence test for sales and use taxes in *Quill*, and the Court has never held that a state has the power under the Commerce Clause to impose gross receipts tax on a company based on any lesser, or different standard than physical presence test of *Tyler Pipe* and *Quill*. Since the bright-line physical presence test applies to taxes like the CAT, the assessments are void in their entirety, and the Determination should be vacated.

7. The Commissioner's assessment of the "failing to register penalty" is erroneous and unlawful in that Crutchfield was not required to register for the CAT because Crutchfield was not a "person subject to" chapter 5751 of the Revised Code. R.C. 5751.04(B).

8. The penalty should be abated. The Commissioner erred in arbitrarily and capriciously asserting penalties for each of the aforesaid reasons, and in light of Crutchfield's good faith reliance upon existing federal constitutional law in regard to the application of the "substantial nexus" test to cases involving gross receipts taxes, as well as sales and use taxes and other state taxes.

REQUEST FOR HEARING

Appellant Crutchfield requests that the Board of Tax Appeals or its attorney examiners conduct a *de novo* hearing in Columbus, Ohio in connection with these assignments of error.

REQUEST FOR RELIEF

Crutchfield respectfully asks that the Determination be vacated in its entirety, that the assessments against Crutchfield for the Tax Periods cancelled, that the Commissioner be barred from asserting CAT liability against Crutchfield for the Tax Periods, and that Crutchfield be awarded such other relief as is just and equitable.

Respectfully submitted,

Matthew P. Schafer By S.L.S. per email auth

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LEGAL COUNSEL FOR APPELLANT, CRUTCHFIELD, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this Notice of Appeal has been filed, via hand delivery, with Joseph W. Testa, Tax Commissioner of Ohio, 30 East Broad Street, 22nd Floor, Columbus, Ohio, on this 25th day of June, 2013.

Steven L. Smiseck (0061615)

EXHIBIT A

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Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: MAY - 1 2013

Crutchfield Corporation
1 Crutchfield Park
Charlottesville, VA 22911

Re: Three Assessments
Commercial Activity Tax
Taxpayer ID No. 96059827
Tax Periods: 10/01/2011 – 06/30/2012

This is the final determination of the Tax Commissioner on a petition for reassessment filed pursuant to R.C. 5751.09 concerning the following commercial activity tax assessments:

Assessment No.	Period	Tax	Interest	Penalty	Payments	Total
17201219256375	10/01/11-12/31/11	$10,000.00	$117.53	$2,000.00	$0.00	$12,117.53
17201219256376	01/01/12-03/31/12	$10,000.00	$44.38	$2,000.00	$0.00	$12,044.38
17201228344172	04/01/12-06/30/12	$10,000.00	$41.10	$5,500.00	$0.00	$15,541.10
	Total	$30,000.00	$203.01	$9,500.00	$0.00	$39,703.01

The petitioner is a corporation based in Virginia. The petitioner is a direct marketer that sells consumer electronics through the Internet from locations entirely outside of Ohio. The petitioner ships its merchandise via the U.S. Mail or using common carriers. The petitioner is not incorporated in Ohio and does not have physical facilities, offices, or showrooms in Ohio. The petitioner has no employees in Ohio and does not own or lease property in Ohio. A review of the petitioner's website indicates that the petitioner sends free catalogs to U.S. resident customers. Information in the possession of the Tax Commissioner shows that the petitioner had more than $500,000 in sales to customers in Ohio and that it failed to file and pay the commercial activity tax required by R.C. 5751.02(A).

The petitioner waived its right to a hearing, therefore the matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied along with the petition.

The petitioner contends that it is not subject to the commercial activity tax, and requests cancellation of the assessments. This contention is not well taken. In summary, the petitioner is subject to the tax because it has "substantial nexus with this state," as that phrase is defined in R.C. 5751.01(H). The petitioner satisfies the third and/or fourth conditions in that division, and therefore is a person on whom the tax is levied. The petitioner sells consumer goods through orders received via the Internet and telephone orders. While the petitioner admits that it has customers in Ohio to which it sells and ships these goods, it asserts that it has no activities or contacts in Ohio which rise to the level necessary for Ohio to constitutionally impose the tax.

0000000164

MAY - 1 2013

Effective June 30, 2005, R.C. 5751.02(A) levies the commercial activity tax

> * * * on each person with taxable gross receipts for the privilege of doing business in this state. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during the calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state.

Pursuant to R.C. 5751.01(H), a person has "substantial nexus with this state" if the person meets any of the following conditions:

(1) Owns or uses a part or all of its capital in this state;
(2) Holds a certificate of compliance with the laws of this state authorizing the person to do business in this state;
(3) Has bright-line presence in this state;
(4) Otherwise has nexus with this state to an extent that the person can be required to remit the tax imposed under this chapter under the Constitution of the United States.

Pursuant to R.C. 5751.01(I), a person "has bright-line presence" in this state for a reporting period if the person meets any of the following conditions:

(1) Has at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars. * * *
(2) Has during the calendar year payroll in this state of at least fifty thousand dollars. * * *
(3) Has during the calendar year taxable gross receipts of at least five hundred thousand dollars.
(4) Has at any time during the calendar year within this state at least twenty-five percent of the person's total property, total payroll, or total gross receipts.
(5) Is domiciled in this state as an individual or for corporate, commercial, or other business purposes.

Division (F) of R.C. 5751.01 defines gross receipts as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person * * * [including] [a]mounts realized from the sale, exchange, or other disposition of the taxpayer's property to or with another." Specifically excluded from gross receipts are "any receipts for which the tax imposed by this chapter is prohibited by the Constitution or laws of the United States or the Constitution of Ohio." R.C. 5751.01(F)(2)(jj) (formerly R.C. 5751.01(F)(2)(z)).

"Taxable gross receipts" is defined as gross receipts sitused to this state under R.C. 5751.033. For purposes of the petitioner, division (E) applies:

> Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by common carrier or by other means of

0000000165
MAY - 1 2013

transportation, the place at which such property is ultimately received after all transportation has completed shall be considered the place where the purchaser receives the property. * * *

The petitioner's overriding assertion is that the Commerce Clause of the United States Constitution precludes the State of Ohio from subjecting it to the commercial activity tax under the authority of R.C. 5751.01(H)(3) or (4). The petitioner contends that imposition of the tax pursuant to either (H)(3) or (H)(4) is improper because the petitioner allegedly does not have the nexus with Ohio that is required under the Commerce Clause. The petitioner asserts that the nexus required is a "physical presence" in the taxing state, which it alleges it did not have during the assessed periods.

To the extent that the petitioner is challenging the constitutionality of R.C. 5751.01(H)(3), (4) and/or R.C.5751.01(I)(3), the Commissioner is without jurisdiction to adjudicate the constitutionality of those statutes. However, the laws of Ohio are presumed to be constitutional. See *State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567. Moreover, a discussion of the constitutional issues is particularly warranted for two reasons. First, R.C. 5751.01(H)(4) requires the commercial activity tax to be imposed to the fullest extent permissible under the Constitution. Second, regardless of R.C. 5751.01(H)(4), compliance with constitutional limitations on state taxation is the sine qua non of any tax assessment.

The Tax Commissioner's assessments have been computed based on information in the Tax Commissioner's possession. By the petitioner's own admission and by information available at the petitioner's website, the goods sold were delivered by common carrier to their ultimate destination in Ohio. Thus, they were "received in this state" and were "taxable gross receipts" within the meaning of R.C. 5751.033(E) and R.C. 5751.01(I)(3). For each calendar year at issue, based on information in the possession of the Tax Commissioner, taxable gross receipts exceeded $500,000.00, so the petitioner had "bright-line presence" pursuant to R.C. 5751.01 (H)(3) and R.C. 5751.01(I)(3). Therefore, the petitioner had "substantial nexus with this state" and was subject to the tax because it had taxable gross receipts exceeding $500,000.00 in each calendar year.

The petitioner contends that application of the commercial activity tax to it would violate the Commerce Clause since the petitioner allegedly does not possess the "bright-line" physical presence in Ohio required by *National Bellas Hess v. Ill. Rev. Dep't* (1967), 386 U.S. 753 and *Quill Corp. v. North Dakota* (1992), 504 U.S. 298. In *Quill*, the Court held that North Dakota's attempt to require an out-of-state mail order company with no physical presence in the state to collect and remit use tax violated the "substantial nexus" requirement of the Commerce Clause. However, in the years since *Quill*, the Court has not extended its holding to other taxes, including income taxes or gross receipts taxes. The highest court in most, but not all, states that have considered the issue, including Ohio, has found that *Quill* applies only to sales and use taxes. See *Couchot v. State Lottery Commission* (1996), 74 Ohio St.3d 417 (finding that the physical-presence requirement of *Quill* was not applicable to taxation of Ohio Lottery winnings of a nonresident, because *Quill* applied only to sales and use taxes, although the requirement would have been satisfied anyway by virtue of the winner's purchase and redemption of the winning ticket in Ohio in a prior year). See also, for example, *Geoffrey v. South Carolina* (1993), 437 S.E.2d 13, *A & F Trademark, Inc. v. Tolson* (2004), 167 N.C. App. 150, *LANCO, Inc. v. Dir., Div. of Taxation* (2006), 908 A.2d 176, *Tax Comm'r v. MBNA America Bank* (2006), 220

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W.Va. 163, and *Capital One Bank v. Commissioner* (2009), 453 Mass. 1.

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The petitioner contends that even if the holding of *Quill* is limited to the sales and use tax context, that holding should apply to the commercial activity tax. However, the Supreme Court of Ohio recently found that the commercial activity tax is not, as the petitioner asserts, the functional equivalent of a sales tax. See *Ohio Grocers Ass'n v. Levin* (2009), 123 Ohio St.3d 303 (holding that the tax is not an excise tax "upon the sale or purchase of food"). Therefore, the *Quill* requirement of physical presence does not apply to the commercial activity tax.

In order to be constitutionally valid, the assessments herein must still satisfy the "substantial nexus" requirement of the Commerce Clause. The petitioner's continuous, systematic, and significant solicitation and this exploitation of the economic marketplace in Ohio is sufficient for this purpose. Therefore, under established Commerce Clause jurisprudence, the imposition of the tax measured by those receipts is not prohibited by the laws or Constitution of either the United States or Ohio.

Lastly, the petitioner contends that even if it was subject to the tax and required to file returns and pay the amounts due, the assessed penalties should be abated in full due to its reasonable reliance on its interpretation of constitutional principles limiting state taxation. The petitioner was assessed penalty pursuant to R.C. 5751.06(A), (B)(1), and (D). The Tax Commissioner may abate these penalties pursuant to R.C. 5751.06(F). The petitioner's contention is not well taken.

Accordingly, the assessments are affirmed.

Current records indicate that no payments have been made on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Ohio Treasurer Josh Mandel." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Commercial Activity Tax Division, P.O. Box 16678, Columbus, OH 43216-6678.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL

JOSEPH W. TESTA
TAX COMMISSIONER

/s/ Joseph W. Testa

Joseph W. Testa
Tax Commissioner

Exhibit 10

OHIO BOARD OF TAX APPEALS

CRUTCHFIELD, INC., (et. al.),

Appellant(s),

vs.

JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (et. al.),

Appellee(s).

CASE NO(S). 2012-926, 2012-3068, 2013-2021

(COMMERCIAL ACTIVITY TAX)

DECISION AND ORDER

APPEARANCES:

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Entered Thursday, February 26, 2015

Mr. Williamson and Mr. Harbarger concur.

This matter is considered by the Board of Tax Appeals upon three notices of appeal filed on behalf of appellant Crutchfield, Inc. ("Crutchfield"). Crutchfield appeals from three final determinations of the Tax Commissioner in which the commissioner affirmed multiple commercial activity tax assessments against Crutchfield, relating to periods from July 1, 2005 through June 30, 2012. This matter is considered by the Board of Tax Appeals upon the notices of appeal, the statutory transcripts ("S.T.") certified to this board by the Tax Commissioner, the record of this board's hearing ("H.R."), and any written argument filed by the parties. We note that Crutchfield exhibits 9 and 11 and Commissioner exhibits 38, 39, 50, and 51 are received into evidence.

In its brief, Crutchfield, which is headquartered in Charlottesville, Virginia, describes itself as a

"direct marketer of consumer electronics, selling products to consumers across the United States, including consumers residing in the State of Ohio. *** With the exception of its retail stores located exclusively in the State of Virginia, Crutchfield sells its products online and by catalog. *** Its online sales are conducted via an Internet website, *** located on the Company's servers in Virginia. *** The company has a warehouse and distribution center located in Virginia; it has no fixed assets located in Ohio." Crutchfield Brief at 7. Before this board, Crutchfield presented extensive testimony and evidence relating to the operations of its website, its email promotions and online advertising, and its participation in comparison websites, as well as its non-internet based marketing efforts. Crutchfield Brief at 9-19.

In each of its notices of appeal to this board, Crutchfield essentially specified the same errors, in pertinent part, as follows:

> "1. Because Crutchfield engages in no commercial activity within the State of Ohio and, likewise, neither owns nor leases property in the state, either directly or indirectly, the Company is not 'doing business in the state' under R.C. 5751.02. The Commercial Activity Tax, therefore, does not apply.
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> "2. Crutchfield lacked a 'substantial nexus with this state' under R.C. 5751.01(H) inasmuch as it: (a) neither owned nor used 'part or all of its capital in this state' [R.C. 5751.01(H)(1)]; (b) lacks a 'certificate of compliance with the laws of this state authorizing [it] to do business in this state' [R.C. 5751.01(H)(2)]; and (c) does not 'otherwise [have] nexus in this state…under the constitution [sic] of the United States.' [R.C. 5751.01(H)(4)].
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> "3. Crutchfield lacked a '"bright-line presence" in this state' under R.C. 5751.01(H)(3) & (I) inasmuch as it did not have: (a) 'at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars' [R.C. 5751.01(I)(1)]; (b) 'during the calendar year payroll in this state of at least fifty thousand dollars' [R.C. 5751.01(I)(2)]; (c) during the calendar year 'taxable gross receipts of at least five hundred thousand dollars,' inasmuch as (i) none of its gross receipts are subject to taxation in Ohio; and (ii) it had no taxable sales within the State of Ohio [R.C. 5751.01(I)(3)]; or (d) 'during the calendar year within this state at least twenty-five per cent [sic] of the person's total property, total payroll, or total receipts.' [R.C. 5751.01(I)(4)]. In addition, Crutchfield was not 'domiciled in this state as an individual or for corporate, commercial, or other business purposes.' [R.C. 5751.01(I)(5)].
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> "4. Crutchfield's receipts are not subject to taxation because, under R.C. 5751.01(F)(2)(ff), such tax is 'prohibited by the Constitution or laws of the United States… .'
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> "5. Ohio statutes should be interpreted to avoid the imposition of the CAT on Crutchfield, inasmuch as imposing the tax on Crutchfield would violate the Company's rights under the Commerce Clause of the United States Constitution. ***

> "6. Application of the CAT to Crutchfield would violate the Company's rights under the Commerce Clause of the United States Constitution since Crutchfield does not possess the requisite 'bright-line' physical presence in Ohio. *** Since the bright-line physical presence test applies to taxes like the CAT, the assessments are void in their entirety, and the Determination should be vacated.
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> "7. Even if an 'economic presence test' were to be applied to this case, the imposition of the CAT against Crutchfield would be unlawful inasmuch as Crutchfield lacked an economic presence in Ohio, and, instead, merely communicated with customers in Ohio via interstate commerce from locations entirely outside of the state.
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> "8. The Commissioner's assessment of the 'failing to register penalty' is erroneous and unlawful in that Crutchfield was not required to register for the CAT because Crutchfield was not a 'person subject to' chapter 5751 of the Revised Code. R.C. 5751.04(B).
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> "9. The penalty should be abated. The Commissioner erred in arbitrarily and capriciously assessing penalties for each of the aforesaid reasons, and in light of Crutchfield's good faith reliance upon existing federal constitutional law in regard to the application of the 'substantial nexus' test to cases involving gross receipts taxes, as well as sales and use taxes and other state taxes." Notice of Appeal, 2012-926, at 5-8.

Initially, we note that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens, Inc. v. Kosydar* (1974), 38 Ohio St.2d 135; *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69; *National Tube v. Glander* (1952), 157 Ohio St. 407. The taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Department Stores v. Lindley* (1983), 5 Ohio St.3d 213.

Crutchfield contends that "[t]he main issue before the Board of Tax Appeals *** is whether the Tax Commissioner *** can impose the Ohio Commercial Activity Tax *** - a tax on gross receipts imposed for 'the privilege of doing business in this state' – on Crutchfield, Inc. ***, a company that did not have a 'substantial nexus' with the State of Ohio within the meaning of the U.S. Constitution." (Footnote omitted.). Crutchfield Brief at 2. Specifically, Crutchfield claims its gross receipts are excluded from the CAT, pursuant to the U.S. Constitution, Commerce Clause, and the "substantial nexus" and corresponding "in-state presence" analysis encountered thereunder. See R.C. 5751.01(F)(2)(z) (as such section was numbered in July 2005).

Upon review of the arguments raised, we find this board's pronouncement in *L.L. Bean, Inc. v. Levin* (Mar. 6, 2014), BTA No. 2010-2853, unreported, settled on appeal (Nov. 20, 2014), 11/20/2014 Case Announcements, 2014-Ohio-5119, to be controlling and dispositive of Crutchfield's specifications of error. As we held in *L.L. Bean*, "this board makes no findings with regard to the constitutional questions presented. The parties, through the presentation of

evidence and testimony and the submission of briefs to this board, have set forth their respective positions regarding the constitutional validity of the commissioner's application of the statutory provisions in question *** and we find such arguments may only be addressed on appeal by a court which has the authority to resolve constitutional challenges." Id. at 6-7. See, also, *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195; *S. S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, paragraph one of the syllabus; *Herrick v. Kosydar* (1975), 44 Ohio St. 2d 128, 130; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St. 3d 7, 8; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, paragraph one of the syllabus. The constitutional implications of the relevant statutory provisions must be considered by a tribunal that has jurisdiction over such questions of constitutional interpretation.

Herein, based upon the applicable commercial activity tax statutory provisions, Crutchfield was assessed commercial activity tax for the periods in question. R.C. 5751.02(A). The commissioner determined that Crutchfield had substantial nexus with this state, i.e., a "bright-line presence" in the state, because it had at least $500,000 in taxable gross receipts for the periods assessed. R.C. 5751.01(H)(3); R.C. 5751.01(I)(3); R.C. 5751.033(E) (as such sections were numbered in July 2005). Crutchfield, like L.L. Bean and others before it, argues that the Commerce Clause of the U.S. Constitution "forbids the imposition of the Ohio CAT on Crutchfield, a non-resident direct marketer with no physical presence in Ohio." Crutchfield Brief at 20. It cites to several cases in support, including *Quill Corp. v. North Dakota* (1992), 504 U.S. 298 (1992) and *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987), contending "a state lacks the power to impose a gross receipts tax on the privilege of doing business upon a remote seller with no physical presence in the state and whose only contact with the state derives from making interstate sales to customers in that state." Crutchfield Brief at 25. Even without considering the constitutional aspects of Crutchfield's position, however, we conclude, under the plain language set forth therein, the pertinent CAT statutes do not impose such an in-state presence requirement. See *L.L. Bean*, supra.

As we stated in *L.L. Bean*, supra, "[a] plain reading of the statutes under consideration provides that an entity has substantial nexus with this state if it has a bright-line presence in this state, which is defined as having taxable gross receipts of at least five hundred thousand dollars ***. While we recognize that an out-of-state seller must have "substantial nexus" with a taxing state, *Quill*, supra, we are also cognizant of the explicit statutory language of R.C. 5751.01(H), where, by definition, substantial nexus exists if any of the elements set forth in R.C. 5751.01(H)(1)-(4) are met. *** [W]e are constrained to follow the mandate of the General Assembly in concluding that appellant, an out-of-state seller, has substantial nexus within this state by virtue of its gross receipts for the reporting periods in question." Id. at 9-10.

Thus, following this board's precedent established in *L.L. Bean*, supra, it is the decision of the Board of Tax Appeals that the final order of the Tax Commissioner must be, and hereby is, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Mr. Harbarger		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

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Kathleen M. Crowley, Board Secretary